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## The Real Id Act and the Negative Impact on Latino Immigrants.

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## COMMENT

### THE REAL ID ACT AND THE NEGATIVE IMPACT ON LATINO IMMIGRANTS

ARIANNA GARCIA\*

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*“They that can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety.”*<sup>1</sup>

## I. INTRODUCTION

The Latino immigrant community is suffering the consequences of the War on Terrorism. Currently, national security takes precedence over other domestic policy issues.<sup>2</sup> After 9/11, the National Commission on Terrorist Attacks upon the United States issued a report (9/11 Report) citing “failed immigration controls” as one of the major causes of the 9/11 terrorist attacks.<sup>3</sup> This report eventually led to the dissolution of the Immigration and Naturalization Service (INS) which was recreated into a subdivision of the Department of Homeland Security (DHS).<sup>4</sup> The recreation of INS under the DHS was the government’s attempt to comply with one of the report’s recommendations—to do a better job of guarding the United States borders.<sup>5</sup>

Although the 9/11 Report stated intelligence failures as a cause of the attacks,<sup>6</sup> the majority of post 9/11 legislation has been aimed at innocent immigrants. For example, stringent national security policies led to an

1. Bartleby.com, <http://www.bartleby.com/73/1056.html> (last visited Dec. 19, 2006) (quoting an inscription on a plaque in the stairwell of the pedestal of the Statue of Liberty).

2. Raquel Aldana & Sylvia Lazos Vargas, *“Aliens” in Our Midst Post-9/11: Legislating Outsiderness Within the Borders*, 38 U.C. DAVIS L. REV. 1683, 1684 (2005) (reviewing BILL ONG HING, *DEFINING AMERICA THROUGH IMMIGRATION POLICY (MAPPING RACISMS SERIES)* (2003); KEVIN R. JOHNSON, *THE “HUDDLED MASSES” MYTH: IMMIGRATION AND CIVIL RIGHTS* (2003); and VICTOR C. ROMERO, *ALIENATED: IMMIGRATION RIGHTS, THE CONSTITUTION, AND EQUALITY IN AMERICA* (2004)).

3. *Id.* at 1685.

4. *Id.* at 1686. Congress believed that hijackers were entering the homeland without trouble and too facilely. *Id.* In addition to the recreation of the INS under the DHS, Congress also funded projects to reinforce border security, reformed immigration law to limit visa issuances, “increased the monitoring of foreign nationals within the United States,” and authorized the “detention and removal of hundreds of foreign nationals.” *Id.* The article goes on to argue that “[i]nstead of giving immigration law free rein to create such harsh boundaries, the law should focus on the humanity of ‘aliens in our midst’ and incorporate an approach that does not legalize the outsiderhood of noncitizens, but, once noncitizens co-exist within our borders, treats them for what they are – human beings.” *Id.* at 1691.

5. *Id.* at 1686. (“As is common in the legislative process, however, the immigration provisions went beyond what was recommended by the 9/11 Commission and beyond what it viewed as necessary to ensure the security of the United States.”).

6. *See id.* at 1685 (stating that according to the 9/11 Commission, the 9/11 tragedy was due in great part to intelligence failures). The “shortfalls in hard-headed analysis at intelligence agency headquarters and a culture that encouraged individual agencies to hoard and not share information” are factors that contributed to the 9/11 tragedy. *Id.*

increase in the use of racial profiling by federal agencies.<sup>7</sup> In June 2003, the Department of Justice issued the “Guidance Regarding the Use of Race by Federal Law Enforcement Agencies” at the request of President Bush to help regulate racial profiling.<sup>8</sup> Though this regulation prohibited racial profiling by federal law enforcement agencies, it did have exceptions including “law enforcement activities or other efforts to defend and safeguard against threats to national security or the integrity of the nation’s borders . . . .”<sup>9</sup>

Congress continued to wage a war against immigration in 2004 with the proposal of the Intelligence Reform and Terrorism Prevention Act.<sup>10</sup> Although the majority of the immigration provisions were left out of the final bill, Congress made sure that the issues left unresolved would be addressed in the following session.<sup>11</sup> Those issues included asylum laws and a possible national standard for issuing driver’s licenses.<sup>12</sup>

The House of Representatives later approved the Real ID Act in February of 2005. This Act included many of the provisions which had been left out of the Terrorism Prevention Act. Coincidentally, the Real ID Act

7. See Katherine Culliton, *In the Aftermath of September 11: Defending Civil Liberties in the Nation’s Capital: The Treatment of Immigrants: How Racial Profiling and Other Unnecessary Post-9/11 Anti-Immigrant Measures Have Exacerbated Long-Standing Discrimination Against Latino Citizens and Immigrants*, 8 UDC/DCSL. L. REV. 141, 141–43 (2004) (arguing that the Department of Justice’s and the Department of Homeland Security’s failure to clarify racial profiling has caused many immigrants to be “detained and deported”). Recently, Latinos and immigrant communities united in order to address concerns about unnecessary post-9/11 actions such as racial profiling. *Id.* Latinos especially, are increasingly being targeted by federal agencies. *Id.* These civil rights violations have not made America safer. *Id.* In fact, racial profiling tactics can lead to alienating communities who could prove to be invaluable sources of information about criminals and terrorists. *Id.*

8. *Id.* at 143.

9. *Id.* (quoting United States Department of Justice, Civil Rights Division, Guidance Regarding the Use of Race by Federal Law Enforcement Agencies (June 2003), available at [http://www.usdoj.gov/crt/split/documents/guidance\\_on\\_race.htm](http://www.usdoj.gov/crt/split/documents/guidance_on_race.htm)). Unfortunately, these exceptions to the “Guidance” have essentially swallowed the rule. *Id.* The exceptions leave too much discretion to federal agencies as to when and when not to use race and national origin profiling. *Id.*

10. MICHAEL JOHN GARCIA, MARGARET MIKYUNG LEE & TODD TATELMAN, CONG. RESEARCH SERV. REPORT FOR CONG., IMMIGRATION: AN ANALYSIS OF THE MAJOR PROVISIONS OF THE REAL ID ACT OF 2005, at 1 (2005), available at <http://www.au.af.mil/au/awc/awcgate/crs/rl32754.pdf>.

11. *See id.*

12. Raquel Aldana & Sylvia Lazos Vargas, “Aliens” in Our Midst Post-9/11: *Legislating Outsiderness Within the Borders*, 38 U.C. DAVIS L. REV. 1683, 1688 (2005) (reviewing BILL ONG HING, *DEFINING AMERICA THROUGH IMMIGRATION POLICY* (MAPPING RACISMS SERIES) (2003); KEVIN R. JOHNSON, *THE “HUDDLED MASSES” MYTH: IMMIGRATION AND CIVIL RIGHTS* (2003); and VICTOR C. ROMERO, *ALIENATED: IMMIGRATION RIGHTS, THE CONSTITUTION, AND EQUALITY IN AMERICA* (2004)).

was attached to an emergency supplemental bill that funded causes like national defense and the war on terror (a “must-pass” bill).<sup>13</sup> Provisions of the Real ID Act include: 1) stringent qualifications on those seeking United States relief;<sup>14</sup> 2) the establishment of federal standards for the issuance of driver’s licenses; and 3) providing authority to Homeland Security for the construction of physical barriers along the United States borders.<sup>15</sup>

Historically, the federal government has attempted to balance the need for legislation against the impact such legislation would have on the civil rights of citizens and non-citizens.<sup>16</sup> After 9/11, however, such a balance is no longer attempted because national security concerns override the concern for civil rights, especially the rights of immigrants.<sup>17</sup> Enactment of the Real ID Act demonstrates how United States policy has changed to favor national security over pro-immigration policies.<sup>18</sup> Hence, immigrants are in danger, especially because there remain few constitutional checks on civil liberties in the area of immigration and alienage law.<sup>19</sup> Current national security policy is taking steps towards a xenophobic society, while at the same time backtracking in the protection of equal rights and liberties. The Real ID Act is just one of the many measures taken to fight terrorism at the cost of civil liberties.<sup>20</sup>

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13. *Id.*

14. See Brian Murphy, *Current Developments: Development in the Legislative Branch: The Real ID Act of 2005: Tightening the Burden on Asylum Seekers, Federal Standards for Driver’s Licenses, and Patching a Hole in a Border Fence at the Cost of Other Legislation*, 19 GEO. IMMIGR. L.J. 191, 191 (2004) (discussing the impact of the Real ID Act on asylum seekers, drivers licenses, and border security).

15. MICHAEL JOHN GARCIA, MARGARET MIKYUNG LEE & TODD TATELMAN, CONG. RESEARCH SERV. REPORT FOR CONG., IMMIGRATION: ANALYSIS OF THE MAJOR PROVISIONS OF THE REAL ID ACT OF 2005, at 2 (2005), available at <http://www.au.af.mil/au/awc/awcgate/crs/rl32754.pdf>.

16. See Raquel Aldana & Sylvia Lazos Vargas, “Aliens” in Our Midst Post-9/11: *Legislating Outsiderhood Within the Borders*, 38 U.C. DAVIS L. REV. 1683, 1718 (2005) (reviewing BILL ONG HING, *DEFINING AMERICA THROUGH IMMIGRATION POLICY (MAPPING RACISMS SERIES)* (2003); KEVIN R. JOHNSON, *THE “HUDDLED MASSES” MYTH: IMMIGRATION AND CIVIL RIGHTS* (2003); and VICTOR C. ROMERO, *ALIENATED: IMMIGRATION RIGHTS, THE CONSTITUTION, AND EQUALITY IN AMERICA* (2004)).

17. See *id.* (arguing that heightened fear levels makes it difficult to strike a balance between civil liberties and national security).

18. *Id.* at 1689.

19. See *id.* (“The legislative tale demonstrates that America’s new concern for national security and its fear of another 9/11 has vastly expanded the scope of immigration and alienage law, an area where there are few constitutional checks on civil liberties.”).

20. Katherine Culliton, *In the Aftermath of September 11: Defending Civil Liberties in the Nation’s Capital: The Treatment of Immigrants: How Racial Profiling and Other Unnecessary Post-9/11 Anti-Immigrant Measures Have Exacerbated Long-Standing Discrimination Against Latino Citizens and Immigrants*, 8 UDC/DCSL L. REV. 141, 142 (2004)

The Latino population currently makes up the largest minority group in the United States.<sup>21</sup> As of March 2004, the Latino population was numbered at 40.4 million.<sup>22</sup> Out of this large number, it is estimated that forty percent of Latino communities are made up of immigrants.<sup>23</sup> Therefore, it is evident that these immigrants will be among those that are impacted most by the anti-immigrant provisions of the Real ID Act. Mexico is the largest source of immigration to the United States, while Cuba also continues to significantly contribute to the unauthorized resident population.<sup>24</sup>

The first part of this comment focuses on the historical background of the Real ID Act. This includes an in-depth look into its origin in the Intelligence Reform and Terrorism Prevention Act of 2004 and its passage as part of the Emergency Supplemental Appropriations Act. It will also address the passage of the Act despite major criticism of the anti-immigrant legislation.<sup>25</sup>

The second part examines the provisions of the Real ID Act and its impact on the Latino immigrant community. This includes the new asylum qualifications, the driver's license provisions, and the provisions allowing for the construction of physical barriers along the United States borders. The new asylum requirements imposed by the Act will make it even more difficult for refugees seeking asylum in the United States by creating factors which judges can use to base his or her credibility deter-

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(providing a list of ten different ways these policies have affected the Latino community). Some of these include: "Operation Tarmac" (which led to a number of Latino airport employees being "rounded up" because of fear of terrorism), less abuse reporting by women immigrants due to a fear of deportation, and fear of abuse because of the treatment of 9/11 detainees. *Id.* at 145-47.

21. See CBS News, *Hispanics Now Largest U.S. Minority*, Jan. 21, 2003, <http://www.cbsnews.com/stories/2003/01/21/national/main537369.shtml> (reporting that Hispanics have surpassed African-Americans as the largest minority group in the United States).

22. Hispanic Trends, *Shaping America's Future, The Coming of Age of Native Born Latinos Foretell an American Revolution*, <http://www.hispaniconline.com/trends/2005/mar-april/briefcase/trends.html> (last visited Dec. 13, 2006). "By 2010, Hispanic Americans are projected to number 47.7 million, a number that will swell to 60.4 million by 2020." *Id.*

23. Katherine Culliton, *In the Aftermath of September 11: Defending Civil Liberties in the Nation's Capital: The Treatment of Immigrants: How Racial Profiling and Other Unnecessary Post-9/11 Anti-Immigrant Measures Have Exacerbated Long-Standing Discrimination Against Latino Citizens and Immigrants*, 8 UDC/DCSL L. REV. 141, 143 (2004).

24. U.S. Citizenship and Immigration Services, *Estimates of the Unauthorized Immigrant Population Residing in the United States 1990-2000* (on file with author) ("In addition to Mexico, six countries had more than 100,000 unauthorized residents in the United States in January 2000 - El Salvador, Guatemala, Colombia, Honduras, China, and Ecuador.").

25. Human Rights First, *Sensenbrenner's Real ID Act Threatens Refugees and Undermines Fundamental Protections*, Jan. 26, 2005, [http://www.humanrightsfirst.org/media/2005\\_alerts/asy\\_0126\\_sens.htm?tr=y&auid=707653](http://www.humanrightsfirst.org/media/2005_alerts/asy_0126_sens.htm?tr=y&auid=707653).

mination on a person's demeanor while before the court.<sup>26</sup> The driver's license provisions restrict the issuance of driver's licenses to immigrants and also limit the government's acceptance of other useful foreign issued documents.<sup>27</sup> The physical borders provision calls for more barriers to be built along the California border which will drive immigrants to cross more dangerous areas to enter the United States.<sup>28</sup> The provision also allows for a waiver of environmental laws in order to construct these barriers.<sup>29</sup>

The third part will provide an effective solution which will attempt to balance the concern for national security with the rights of the Latino immigrant population. This solution will take into consideration the vast numbers of the Latino immigrant population now present in the United States. It will also involve a number of measures that were put in place before the Real ID Act.

## II. IMMIGRATION REFORM RISES AS A PUBLIC CONCERN

Even though the majority of Americans share a common immigrant background, immigration has remained a topic of continuing controversy.<sup>30</sup> Since the 1800s, policies concerning immigration have involved areas such as economic needs, foreign policy objectives, religious and ethnic biases. Most recently, national security concerns have become a priority.<sup>31</sup> The United States Constitution specifies certain powers that Congress can exercise to regulate and develop immigration laws.<sup>32</sup> "Congress has long been recognized, under the plenary power doctrine, as implicitly having virtually unfettered discretion to admit or exclude

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26. See Jennifer Hopkins, *Real ID Act of 2005*, U.S. VISA NEWS, Feb. 10, 2005, available at <http://www.usvisanews.com/articles/memo2389.shtml> (stating that the Real ID Act "amends the Immigration and Nationality Act to require asylum applicants accused of being members or supporters of guerilla, militant, or terrorist organizations to prove that race, religion, nationality, membership in a particular social group, or political opinion was or will be (if removed) the central reason for their persecution").

27. See CONGRESSIONAL BUDGET OFFICE COST ESTIMATE, H.R. 418 REAL ID ACT 2005 (2005), <http://www.cbo.gov/ftpdocs/60xx/doc6072/hr418.pdf> (indicating that there are currently a minimum of ten states that accept foreign documents).

28. *Id.*

29. *Id.*

30. See generally Ryan D. Frei, Comment, *Reforming U.S. Immigration Policy in an Era of Latin American Immigration: The Logic Inherent in Accommodating the Inevitable*, 39 U. RICH. L. REV. 1355 (2005).

31. See *id.* at 1356 (stating that fear of immigrants led to the more restrictive immigration legislation).

32. See *id.* (indicating that Congress has the power to exclude an immigrant anytime it sees fit).

immigrants in any manner it deems appropriate at a given time.”<sup>33</sup> The plenary power doctrine confers broad authority to the legislative and executive branches of the government to regulate immigration.<sup>34</sup> The doctrine also encourages the judicial system to refrain from intervening in immigration matters.<sup>35</sup>

Immediately after the terrorist attacks of September 11, 2001, “immigration law rose to the forefront of public consciousness.”<sup>36</sup> “[I]t has become increasingly apparent that the Bush Administration views immigration through a ‘[national] security lens.’”<sup>37</sup> Congress developed the National Commission on Terrorist Attacks Upon the United States (9/11 Commission), which President George W. Bush implemented in late 2002.<sup>38</sup> This independent, bipartisan commission was responsible for preparing a detailed and complete report of the circumstances surrounding the terrorist attacks of September 11.<sup>39</sup> The report was to include the response and preparedness of all involved government agencies.<sup>40</sup> More importantly, the 9/11 Commission was ordered to provide Congress with recommendations for the prevention of future terrorist attacks.<sup>41</sup>

33. *Id.*

34. See Trevor Morrison, *The Supreme Court and Immigration Law: A New Commitment to Avoiding Hard Constitutional Questions?*, FINDLAW, July 31, 2001, [http://writ.corporate.findlaw.com/commentary/20010731\\_morrison.html](http://writ.corporate.findlaw.com/commentary/20010731_morrison.html) (stating “[t]he plenary power doctrine has been a central feature of the Supreme Court’s immigration jurisprudence since the late nineteenth century”).

35. See *id.* (noting that the plenary power doctrine has not been invoked by the Supreme Court in most recent immigration cases, despite the government relying on the doctrine in its arguments).

36. See Zoe Lofgren, Symposium: Globalization, Security & Human Rights: Immigration in the Twenty-First Century, *A Decade of Radical Change in Immigration Law: An Inside Perspective*, 16 STAN. L. & POL’Y REV. 349, 371 (2005) (asserting that the Republican Congress used the theme of national security to justify the passage of radical immigration changes). The author’s “insider perspective” on immigration law issues comes by way of her experience as a member of Congress. *Id.* at 349. Representative Lofgren has represented the Sixteenth District of California in the U.S. House of Representatives since 1995. *Id.* She serves on the House Judiciary Committee and its Immigration, Border Security, and Claims Subcommittee. *Id.* Prior to her election as a Congresswoman, the author practiced immigration law. *Id.*

37. Ryan D. Frei, Comment, *Reforming U.S. Immigration Policy in an Era of Latin American Immigration: The Logic Inherent in Accommodating the Inevitable*, 39 U. RICH. L. REV. 1355, 1395 (2005) (quoting Doris Meissner, *Immigration in the Post 9-11 Era*, 40 BRANDIS L.J. 851, 852 (2002)). Since September 11, 2001, the United States has heightened its concerns over terrorism and national security. *Id.*

38. National Commission on Terrorist Attacks Upon the United States, <http://www.9-11commission.gov/> (last visited Dec. 19, 2006).

39. *Id.*

40. *Id.*

41. *Id.*



The 9/11 Commission released the report on July 22, 2004.<sup>42</sup> Along with intelligence failures, the commission cited immigration as one of the underlying causes of the terrorist attacks.<sup>43</sup> There were four main recommendations in the 9/11 report concerning immigration.<sup>44</sup> The commission stressed travel security and urged for an international collaborative effort to alleviate travel security concerns.<sup>45</sup> The commission also pushed to incorporate border control with other infrastructure and suggested the implementation of an entry and exit screening system to be completed by the Department of Homeland Security.<sup>46</sup> The goals of these recommendations were to 1) ensure that the United States improved the security of its borders, 2) make sure that foreign nationals in the United States were not suspected terrorists, and 3) keep track of foreign nationals within the United States.<sup>47</sup>

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42. See *id.* (noting that the 9/11 Commission closed on August 21, 2004).

43. See Raquel Aldana & Sylvia Lazos Vargas, “*Aliens*” in *Our Midst Post-9/11: Legislating Outsiderness Within the Borders*, 38 U.C. DAVIS L. REV. 1683, 1685 (2005) (reviewing BILL ONG HING, *DEFINING AMERICA THROUGH IMMIGRATION POLICY* (MAPPING RACISMS SERIES) (2003); KEVIN R. JOHNSON, *THE “HUDDLED MASSES” MYTH: IMMIGRATION AND CIVIL RIGHTS* (2003); and VICTOR C. ROMERO, *ALIENATED: IMMIGRATION RIGHTS, THE CONSTITUTION, AND EQUALITY IN AMERICA* (2004)) (asserting that “[t]he terrorist who planned and executed the 9/11 attacks were all foreign nationals legally admitted into the country under immigration laws”).

44. See Zoe Lofgren, Symposium: Globalization, Security & Human Rights: Immigration in the Twenty-First Century, *A Decade of Radical Change in Immigration Law: An Inside Perspective*, 16 STAN. L. & POL’Y REV. 349, 371 (2005) (restating the 9/11 Commission’s four main recommendations regarding immigration: (1) travel security, (2) border control, (3) entry and exit screening, and (4) the need for an international collaborative effort to prevent the entry of terrorists).

45. See *id.* at 371 (quoting that “[t]he United States should combine intelligence, operations, and law enforcement in a strategy to intercept terrorists, find terrorist travel facilitators, and constrain terrorist mobility”).

46. *Id.* One of the 9/11 Commission recommendations was that “[t]he president should direct the Department of Homeland Security to lead the effort to design a comprehensive screening system, addressing common problems and setting common standards with systemwide goals in mind. Extending those standards among other government could dramatically strengthen America and the world’s collective ability to intercept individuals who pose catastrophic threats.” *Id.*

47. See Raquel Aldana & Sylvia Lazos Vargas, “*Aliens*” in *Our Midst Post-9/11: Legislating Outsiderness Within the Borders*, 38 U.C. DAVIS L. REV. 1683, 1685–86 (2005) (reviewing BILL ONG HING, *DEFINING AMERICA THROUGH IMMIGRATION POLICY* (MAPPING RACISMS SERIES) (2003); KEVIN R. JOHNSON, *THE “HUDDLED MASSES” MYTH: IMMIGRATION AND CIVIL RIGHTS* (2003); and VICTOR C. ROMERO, *ALIENATED: IMMIGRATION RIGHTS, THE CONSTITUTION, AND EQUALITY IN AMERICA* (2004)) (alleging that the “immigration provisions went beyond what was recommended by the 9/11 Commission and beyond what it viewed as necessary to ensure the security of the United States”).

A. *H.R. 10 & S.B. 2845: The Beginnings of the Real ID Act*

Agencies such as the Immigration and Naturalization Service (INS) were targeted as those responsible for “letting the hijackers into the homeland.”<sup>48</sup> This led to the dissolution of the agency, which was later absorbed into a subdivision of what is now the Department of Homeland Security.<sup>49</sup> In the 108th Congress, several “bills were introduced to implement the 9/11 . . . [r]eport recommendations.”<sup>50</sup> There were only two bills that both the House and Senate considered: H.R. 10, the 9/11 Recommendations and Implementations Act, and S.B. 2845, the Intelligence Reform and Terrorism Prevention Act.<sup>51</sup> Both bills were attempts to implement the 9/11 report recommendations but their goals and provisions were dramatically different.<sup>52</sup> A bipartisan group of senators drafted and co-sponsored the Intelligence Reform Bill in an attempt to gain majority support in the Senate.<sup>53</sup> Only two senators opposed the bill, and it passed with ninety-six votes.<sup>54</sup> The 9/11 Recommendations bill, on the other hand, was a completely partisan endeavor.<sup>55</sup> The drafters and co-sponsors consisted of twenty-six Republicans,<sup>56</sup> and it passed in the House with a vote of 282 to 134.<sup>57</sup>

The 9/11 Recommendations Bill, unlike the Intelligence Reform Bill, included many immigration provisions that had very little relation to national security.<sup>58</sup> This included one provision that extended the required time that an immigrant would have to prove presence in the United States to avoid expedited removal from two years to five years.<sup>59</sup> Expedited removal is a process that allows the Department of Homeland Security to immediately remove a non-citizen without review by an immigration judge.<sup>60</sup> The 9/11 Recommendations Bill also aimed to

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48. *Id.* at 1686.

49. *See id.*

50. Zoe Lofgren, Symposium: Globalization, Security & Human Rights: Immigration in the Twenty-First Century, *A Decade of Radical Change in Immigration Law: An Inside Perspective*, 16 *STAN. L. & POL'Y REV.* 349, 372 (2005).

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. ZOE LOFGREN, Symposium: Globalization, Security & Human Rights: Immigration in the Twenty-First Century, *A Decade of Radical Change in Immigration Law: An Inside Perspective*, 16 *STAN. L. & POL'Y REV.* 349, 372 (2005).

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *See* Mary Kenney, *DHS Announces Unprecedented Expansion of Expedited Removal to the Interior*, THE AMERICAN IMMIGRATION LAW FOUNDATION, Aug. 13, 2004,

change the asylum system by increasing the evidentiary standard.<sup>61</sup> This new standard was an effort to make it harder for asylum claims to be approved and had little relation to terrorism or the prevention of it.<sup>62</sup> Regardless, supporters of the bill titled this specific provision, “Preventing Terrorists from Obtaining Asylum.”<sup>63</sup> They advocated a strong need for asylum reform even though the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) had already improved the asylum process by decreasing the number of fraudulent asylum claims as well as limiting judicial review of removal orders.<sup>64</sup>

The 9/11 Recommendations Bill also included a provision that prohibited states from issuing driver’s licenses to immigrants without legal documentation.<sup>65</sup> This was apparently due to the fact that some of the 9/11 terrorists had valid driver’s licenses which they used to board the planes even though their immigration status was illegal.<sup>66</sup> The 9/11 Recommendations Bill was strongly supported by the Republican leadership citing it as necessary legislation to ensure national security.<sup>67</sup> “It took more than two months after the House passed [the Recommendations Bill] and the Senate passed [the Intelligence Reform Bill] to finally reach an agreement that passed both the House and Senate and was signed by the Presi-

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[http://www.aifl.org/lac/lac\\_pa\\_081704.asp](http://www.aifl.org/lac/lac_pa_081704.asp) (discussing an announcement by the Department of Homeland Security that it will expand the concept of “expedited removal” to include, for the first time, certain non-citizens apprehended within the U.S.).

61. Zoe Lofgren, Symposium: Globalization, Security & Human Rights: Immigration in the Twenty-First Century, *A Decade of Radical Change in Immigration Law: An Inside Perspective*, 16 STAN. L. & POL’Y REV. 349, 374 (2005).

62. *See id.* at 373–74 (highlighting that H.R. 10 heightens the evidentiary standard claims for asylum seekers and expands removal of individuals in the United States who cannot prove they were in the U.S. for five years or more).

63. *See id.* at 373 (“[W]ith advocates of the bill insisting this asylum provision would make our country more safe from terrorism . . . [t]hey even titled the provision accordingly: ‘Preventing Terrorist from Obtaining Asylum.’”).

64. *See* MICHAEL JOHN GARCIA, MARGARET MIKYUNG LEE & TODD TATELMAN, CONG. RESEARCH SERV. REPORT FOR CONG., IMMIGRATION: ANALYSIS OF THE MAJOR PROVISIONS OF THE REAL ID ACT OF 2005, at 2 (2005), available at <http://www.au.af.mil/au/awc/awcgate/crs/rl32754.pdf> (illustrating that since the 9/11 Commission report there has been serious concern about terrorists exploiting humanitarian efforts under the guise of immigration law).

65. *See* Zoe Lofgren, Symposium: Globalization, Security & Human Rights: Immigration in the Twenty-First Century, *A Decade of Radical Change in Immigration Law: An Inside Perspective*, 16 STAN. L. & POL’Y REV. 349, 374 (2005) (arguing H.R. 10 provisions had little to do with any of the 9/11 Commission’s recommendations).

66. *See id.* (pointing out that terrorists can board a plane without a driver’s license by simply using a passport).

67. *See id.*

dent.”<sup>68</sup> This agreement was passed as the Intelligence Reform and Terrorism Prevention Act of 2004.<sup>69</sup> The Act did not include any of the immigration provisions that had been proposed in H.R. 10.<sup>70</sup> It was only after promising that the excluded provisions would be added in the first “must pass bill” of the 109th Congress that the agreement was reached.<sup>71</sup>

#### B. *H.R. 418 Introduction of the Real ID Act*

On January 26, 2005, at the beginning of the 109th Congress, Representative James Sensenbrenner<sup>72</sup> introduced H.R. 418: The Real ID Act of 2005.<sup>73</sup> Sensenbrenner stated, “[t]he goal of the Real ID Act is straightforward: it seeks to prevent another 9/11-type attack by disrupting terrorist travel.”<sup>74</sup> The bill included the same provisions to prohibit the issuance of driver’s licenses to illegal immigrants as well as those to increase the evidentiary standard for obtaining asylum.<sup>75</sup> Other House supporters of the legislation cited the bill as legislation that would close the loopholes in the current asylum system and strengthen the deporta-

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68. *See id.* (detailing the passage of H.R. 10 through the House and Senate and when an agreement was finally reached in December of 2004).

69. Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-408, 118 Stat. 3638.

70. *See* Zoe Lofgren, Symposium: Globalization, Security & Human Rights: Immigration in the Twenty-First Century, *A Decade of Radical Change in Immigration Law: An Inside Perspective*, 16 STAN. L. & POL’Y REV. 349, 374 (2005) (stating that the agreement reached in December 2004 did not include the controversial provisions that had spurred the debate).

71. *See id.* (explaining that the compromise in December 2004 was the key to the agreement that allowed opportunists to include the provisions later in the Real ID Act).

72. MICHAEL JOHN GARCIA, MARGARET MIKYUNG LEE & TODD TATELMAN, CONG. RESEARCH SERV. REPORT FOR CONG., IMMIGRATION: ANALYSIS OF THE MAJOR PROVISIONS OF THE REAL ID ACT OF 2005, at 1 (2005), available at <http://www.au.af.mil/au/awc/awcgate/crs/rl32754.pdf>. Representative Sensenbrenner was the Chairman of the House Judiciary Committee at that time. *Id.*

73. Zoe Lofgren, Symposium: Globalization, Security & Human Rights: Immigration in the Twenty-First Century, *A Decade of Radical Change in Immigration Law: An Inside Perspective*, 16 STAN. L. & POL’Y REV. 349, 375 (2005).

74. *See* Boston.com, *A Mistaken ID Bill*, Apr. 27, 2005, [http://www.boston.com/news/globe/editorial\\_opinion/editorials/articles/2005/04/27/a\\_mistaken\\_id\\_bill](http://www.boston.com/news/globe/editorial_opinion/editorials/articles/2005/04/27/a_mistaken_id_bill), *Amistaken ID Bill*, Apr. 27, 2005, [http://www.humanrightsfirst.org/media/2005\\_alerts/asy\\_0126\\_sens.htm](http://www.humanrightsfirst.org/media/2005_alerts/asy_0126_sens.htm).

75. *See* Zoe Lofgren, Symposium: Globalization, Security & Human Rights: Immigration in the Twenty-First Century, *A Decade of Radical Change in Immigration Law: An Inside Perspective*, 16 STAN. L. & POL’Y REV. 349, 375 (2005) (outlining the pertinent provisions of the Real ID Act that relate to the government issuance of identification document and asylum obtainment standards).

tion laws which referred to the 9/11. The report stated, “for terrorists, travel documents are as important as weapons.”<sup>76</sup> The Real ID Act successfully passed the House on February 10, 2005.<sup>77</sup>

It was then that the text of the bill was added to H.R. 1268, which was the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief.<sup>78</sup> The Emergency Supplemental Act was introduced in March of 2005 by Representative Jerry Lewis and successfully passed the House five days later.<sup>79</sup> The Emergency Supplemental Act passed in the Senate on April 21, 2005, by a ninety-nine to zero vote.<sup>80</sup> The version of the bill passed in the Senate did not include the Real ID Act provisions.<sup>81</sup> The lack of identification provisions in existing legislation led to a conference report geared toward clearing up the discrepancies between the two bills.<sup>82</sup> Some members of the Senate urged removal of the Real ID Act from the Emergency Supplemental Bill.<sup>83</sup> Congressman Feinstein described the bill as one that

76. Press Release, United States Representative Mike Pence, Pence Supports Legislation to Strengthen National Security Measures (Feb. 9, 2005) (on file with author) (publicizing Representative Pence’s support for the Real ID Act). Press Secretary Matt Lloyd promoted the bill as a boost for national security, a key to more adequate border security, and a plug on loopholes that have the potential to be exploited by terrorists. *Id.* On the floor of the House of Representatives, Rep. Pence said: “As the 9-11 Commission Report stated, for terrorists, travel documents are as important as weapons. The report pointed out that ‘[a]ll but one of the 9-11 hijackers acquired some form of U.S. identification card by fraud and that acquisition of these forms of identification assisted them in boarding commercial flights.’” *Id.*

77. MICHAEL JOHN GARCIA, MARGARET MIKYUNG LEE & TODD TATELMAN, CONG. RESEARCH SERV. REPORT FOR CONG., IMMIGRATION: ANALYSIS OF THE MAJOR PROVISIONS OF THE REAL ID ACT OF 2005, at 1 (2005), available at <http://www.au.af.mil/au/awc/awcgate/crs/r132754.pdf>.

78. *See id.* (noting that the text of the Real ID Act was added to the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief).

79. *Id.*

80. *Id.*

81. *Id.*

82. *See* MICHAEL JOHN GARCIA, MARGARET MIKYUNG LEE & TODD TATELMAN, CONG. RESEARCH SERV. REPORT FOR CONG., IMMIGRATION: ANALYSIS OF THE MAJOR PROVISIONS OF THE REAL ID ACT OF 2005, at 1–2 (2005), available at <http://www.au.af.mil/au/awc/awcgate/crs/r132754.pdf> (reporting the calling of a conference committee to resolve the differences between the competing pieces of legislation). Conference committees are common in Congress and are comprised of members from both the House and the Senate. *Id.* The conference committee is charged with melting two bills into one in the form of a conference report that will be subject to an up or down vote in each chamber. *Id.*

83. *See* Press Release, United States Senator Dianne Feinstein, Senator Feinstein Urges Removing Real ID Act from Supplemental Spending Bill Conference (April 22, 2005) (on file with author) (citing specific concerns, Press Secretary Howard Gantman announced that Senator Feinstein urged Senator Harry Reid, the Democratic Senate mi-

should be deliberated and considered carefully given the impact it was going to have on immigration and asylum law.<sup>84</sup> Feinstein urged further that the Emergency Supplemental Bill should be tailored strictly to support the troops in Iraq and Afghanistan and to provide aid for the tsunami victims and that it should not include legislation such as the Real ID Act.<sup>85</sup> On May 5, 2005, the House passed the conference report that supposedly cleared the discrepancies between the two bills.<sup>86</sup> Despite opposition to the “unworkable” provisions,<sup>87</sup> Senate followed suit five days later.<sup>88</sup> The Real ID Act was enacted into law on May 11, 2005.<sup>89</sup>

The major provisions of the Act include: (1) preventing terrorists from obtaining asylum or relief from removal; (2) waiver of laws to facilitate borders at barriers; (3) judicial review of orders of removal; (4) inadmissibility and deportability due to terrorist and terrorist-related activities; (5) improved security for driver’s licenses and personal identification cards; and (6) improving border infrastructure and technology integration.<sup>90</sup> The provisions specifically addressed in this comment are the asylum provision, the driver’s license provision, and the provision allowing for waiver of laws for physical barriers along the United States borders.

The asylum provisions of the Real ID Act amends the Immigration and Nationality Act (INA) which sets forth the asylum laws currently in

nority leader, to oppose inclusion of the House Real ID Act provisions in the bicameral conference report).

84. *Id.*

85. *Id.* A portion of the letter to Senator Reid was quoted as follows: “The emergency supplemental spending bill is a bill which should be narrowly tailored to support our troops in Iraq and Afghanistan, as well as tsunami victims. It should not include such a significant, and controversial, piece of immigration legislation as the Real ID Act.” *Id.*

86. MICHAEL JOHN GARCIA, MARGARET MIKYUNG LEE & TODD TATELMAN, CONG. RESEARCH SERV. REPORT FOR CONG., IMMIGRATION: ANALYSIS OF THE MAJOR PROVISIONS OF THE REAL ID ACT OF 2005, at 2 (2005), available at <http://www.au.af.mil/au/awc/awcgate/crs/r132754.pdf> (noting that “[t]he conference report, H.R. REP. No. 109–72, passed the House on a vote of 368–58 on May 5, 2005”).

87. *Leiberman Says Real ID Act Would Make Nation Less Safe by Repealing Terrorist Safeguards Enacted Upon Recommendation of 9/11 Commission*, STATES NEWS SERV., Apr. 14, 2005 (on file with author). Senator Lieberman rose in opposition to the Real ID Act on the floor of the Senate. *Id.* The Connecticut senator opined that “[t]he Real ID Act would repeal much of work from last year, and replace it with the provisions that impose on states governments unworkable standards for driver’s licenses.” *Id.*

88. See MICHAEL JOHN GARCIA, MARGARET MIKYUNG LEE & TODD TATELMAN, CONG. RESEARCH SERV. REPORT FOR CONG., IMMIGRATION: ANALYSIS OF THE MAJOR PROVISIONS OF THE REAL ID ACT OF 2005, at 2 (2005), available at <http://www.au.af.mil/au/awc/awcgate/crs/r132754.pdf> (reporting that the conference report, H.R. REP. No. 109–72, was passed by the Senate on May 10, 2005 by a 100–0 vote).

89. *Id.*

90. *Id.*

place.<sup>91</sup> The Real ID Act, in subsection 101(a), amends Section 208(b)(1) of the INA by strengthening the standard for proving a “well-founded” fear of persecution.<sup>92</sup> It also clarifies that the Secretary of Homeland Security as well as the Attorney General will both have authority to grant asylum.<sup>93</sup> Subsection 101(a)(3) of the Act tries to implement consistent evidentiary determinations in regard to the standards for burden of proof, determining credibility of the asylum seeker, and determining when corroborating evidence may be required.<sup>94</sup> This subsection also creates a new standard for asylum which requires that the applicant for asylum establish that “at least one central reason for persecution was or will be race, religion, nationality, membership in a particular social group, or political opinion.”<sup>95</sup>

With regards to driver’s licenses and personal identification cards, the Real ID Act includes provisions to improve security of identification documents and instructions for states that do not abide by the Act’s provisions.<sup>96</sup> The Act also makes void other conflicting provisions of the Intelligence Reform and Terrorism Prevention Act of 2004.<sup>97</sup> Although the Act does not impose federal standards for driver’s licenses on the states directly, states must implement these standards in order to provide their respective citizens with documentation that will be recognized by federal agencies.<sup>98</sup> “For purposes of the act, an ‘official purpose’ is defined as including, but not limited to, accessing federal facilities, boarding federally regulated commercial aircraft, entering nuclear power plants, and any other purposes that the Secretary [of Homeland Security] shall determine.”<sup>99</sup>

Finally, concerning the construction of barriers along the United States border, the Illegal Immigrant Reform and Immigrant Responsibility Act of 1996 (IIRIRA) provided for construction and strengthening of these

91. *Id.*

92. *Id.*

93. MICHAEL JOHN GARCIA, MARGARET MIKYUNG LEE & TODD TATELMAN, CONG. RESEARCH SERV. REPORT FOR CONG., IMMIGRATION: ANALYSIS OF THE MAJOR PROVISIONS OF THE REAL ID ACT OF 2005, at 5 (2005), available at <http://www.au.af.mil/au/awc/awcgate/crs/rl32754.pdf>.

94. *Id.* at 6.

95. *Id.* at 5 (emphasis omitted).

96. *Id.* at 38.

97. *Id.*

98. MICHAEL JOHN GARCIA, MARGARET MIKYUNG LEE & TODD TATELMAN, CONG. RESEARCH SERV. REPORT FOR CONG., IMMIGRATION: ANALYSIS OF THE MAJOR PROVISIONS OF THE REAL ID ACT OF 2005, at 40 (2005), available at <http://www.au.af.mil/au/awc/awcgate/crs/rl32754.pdf>.

99. *Id.* (quoting the enacted version of the REAL ID Act) (emphasis added).

barriers.<sup>100</sup> More specifically, Section 102(c) of the IIRIRA allowed for a waiver of certain environmental restrictions but only to the extent as the Attorney General deemed necessary to guarantee prompt construction of barriers and roads.<sup>101</sup> Despite waiver of environmental laws, the construction of the barriers was still delayed due to other state coastal laws.<sup>102</sup> The Real ID Act changes this. It extends the wavier authority to include any law that may impede the prompt construction of barriers and roads along the border.<sup>103</sup> It also limits judicial review of a waiver decision by the Secretary of Homeland Security.<sup>104</sup>

### III. PROVISIONS OF THE REAL ID ACT AND ITS EFFECT ON LATINO IMMIGRANTS

#### A. *Asylum Qualifications*

Immigration law is derived from numerous sources such as case law, the United States Constitution, and congressional statutes.<sup>105</sup> A great deal of immigration law, including asylum procedure, is governed in accordance with the Immigration and Nationality Act (INA) created in 1952.<sup>106</sup> According to the INA, the Attorney General may grant asylum to an alien if he determines that the alien is a refugee.<sup>107</sup> The INA defines a refugee as “an alien who is outside his native country and is unable or unwilling to return to that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.”<sup>108</sup> This does not mean that every person who meets the requirements of a refu-

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100. *Id.* at 15.

101. *Id.*

102. *Id.*

103. MICHAEL JOHN GARCIA, MARGARET MIKYUNG LEE & TODD TATELMAN, CONG. RESEARCH SERV. REPORT FOR CONG., IMMIGRATION: ANALYSIS OF THE MAJOR PROVISIONS OF THE REAL ID ACT OF 2005, at 15 (2005), available at <http://www.au.af.mil/au/awc/awcgate/crs/rl32754.pdf>.

104. *Id.*

105. See U.S. Citizenship and Immigration Services, *Making Immigration Law* (on file with author) (discussing generally how immigration law is derived and enforced).

106. See *id.* (describing the breadth of the Immigration and Nationality Act).

107. See Immigration and Nationality Act of 1952 § 208, 8 U.S.C. § 1158 (West 2006) (granting authority to the Attorney General upon satisfaction of specific statutory requirements).

108. See *El-Sheikh v. Ashcroft*, 388 F.3d 643, 646–47 (8th Cir. 2004) (discussing the Attorney General’s discretion to grant a refugee asylum and defining a refugee); see also Immigration and Nationality Act of 1952 §101, 8 U.S.C. § 1101 (West 2006). This is the direct provision under the Act that empowers the Attorney General to grant asylum at his or her discretion. *Id.*



gee is granted asylum.<sup>109</sup> Currently, it is at the Attorney General's discretion to grant asylum to a refugee.<sup>110</sup> Implementation of the Real ID Act resulted in an amendment to Section 208(b)(1) of the INA which granted the Secretary of Homeland Security authority over asylum matters.<sup>111</sup>

The Supreme Court has held that the "well-founded fear of persecution" standard can be met if the applicant can show a "reasonable possibility" of persecution.<sup>112</sup> Therefore, the asylum applicant does not have to show that presence in his country would result in persecution, only that there is a possibility of such persecution.<sup>113</sup> Case precedent has further established that an alien does not need to prove that "it is more likely than not that he or she will be persecuted in his or her home country" in order to show a well-founded fear of persecution.<sup>114</sup> Other federal court decisions have held that a well-founded fear of persecution is met when the alien can show that the fear is both "subjectively genuine and objectively reasonable."<sup>115</sup> Thus, under the INA, the burden of proof is on the applicant to show that he or she is a refugee within the meaning of the definition.<sup>116</sup>

Subsection 101(a)(3) of the Real ID Act not only reinforces the notion that the burden of proof is on the applicant but also imposes an addi-

109. See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 428 (1987) (noting that determining that an alien is a refugee is vital to the asylum-seeking process, but that such a determination does not guarantee asylum). The Court goes on to explain that the ultimate decision of whether or not to grant asylum, even after a determination that an alien is a refugee, resides with the Attorney General. *Id.*

110. Immigration and Nationality Act of 1952 § 208, 8 U.S.C. § 1158 (West 2006).

111. See MICHAEL JOHN GARCIA, MARGARET MIKYUNG LEE & TODD TATELMAN, CONG. RESEARCH SERV. REPORT FOR CONG., IMMIGRATION: ANALYSIS OF THE MAJOR PROVISIONS OF THE REAL ID ACT OF 2005, at 15 (2005), available at <http://www.au.af.mil/au/awc/awcgate/crs/rl32754.pdf> (explaining how the Real ID Act grants powers to both officials in the wake of the formation of the Department of Homeland Security).

112. See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 440 (1987) (citing *INS v. Stevic*, 467 U.S. 407 (1984) in which the respondent alien was entitled to a new hearing to withhold his deportation to his home country on the basis of his association with a particular social group).

113. See *id.* (discussing why the Court affirmed a 9th Circuit decision which held that different standards applied when withholding an alien's deportation under the INA and governing applications for asylum under the Refugee Act of 1980).

114. *Id.* at 422.

115. *El-Sheikh v. Ashcroft*, 388 F.3d 643, 646 (8th Cir. 2004) ("To show a well-founded fear of persecution, an alien must show that the fear is both subjectively genuine and objectively reasonable.").

116. See 8 C.F.R. § 208.13 (West 2006) ("The burden of proof is on the applicant for asylum to establish that he or she is a refugee . . .").

tional standard on the applicant.<sup>117</sup> The asylum applicant now must also show that race, religion, nationality, membership in a political social group or political opinion was or will be “at least one central reason” for persecution.<sup>118</sup> This is a stricter requirement of the “mixed motives” concept for persecution that had been addressed in past case law.<sup>119</sup> If asylum applicants can show more than one motive for persecution, they would be granted asylum as long as one of those motives was a statutory ground for persecution.<sup>120</sup> The Board of Immigration Appeals held that the asylum applicant did not have to conclusively show why persecution had or would occur.<sup>121</sup> The Board was aware that often times mixed motives were the cause of persecution or that motives were hidden.<sup>122</sup> The implementation of the Real ID Act now requires asylum seekers to testify as to the persecutor’s central motive behind the persecution, which can be problematic or even unreasonable.<sup>123</sup> Asylum seekers needing to track down documentation or proof of their persecution could endanger family members left behind.<sup>124</sup> According to Legislative counsel for Human Rights First, Cory Smith, “this bill would deny asylum and deport a refugee who is unwilling to risk her family’s safety to meet this new burden.”<sup>125</sup> This is especially the case when mixed motives may be involved.<sup>126</sup>

Subsection 101(a)(3) of the Real ID Act also standardizes evidentiary determinations involved in seeking asylum with regards to the burden of proof, the credibility of applicant testimony, and establishing when cor-

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117. MICHAEL JOHN GARCIA, MARGARET MIKYUNG LEE & TODD TATELMAN, CONG. RESEARCH SERV. REPORT FOR CONG., IMMIGRATION: ANALYSIS OF THE MAJOR PROVISIONS OF THE REAL ID ACT OF 2005, at 5 (2005), available at <http://www.au.af.mil/au/awc/awcgate/crs/rl32754.pdf>.

118. *Id.*

119. *Id.*

120. *Id.* at 5–6.

121. See *The Real ID Act of 2005 and Its Negative Impact on Asylum Seekers*, AMNESTY INT’L, at 1, Mar. 2005, available at [http://www.amnestyusa.org/uspolicy/pdf/realid\\_0305.pdf](http://www.amnestyusa.org/uspolicy/pdf/realid_0305.pdf) (explaining that the Board of Immigration Appeals ruled that asylum applicants do not have to show conclusively that persecution has or will occur because they realize that persecutors often have mixed motives and how the Real ID Act has modified this ruling).

122. *Id.*

123. See *id.* (“To determine what was in the mind of a persecutor, particularly where mixed motives are involved, is obviously problematic if not unreasonable.”).

124. *Id.*

125. *Id.*

126. *The Real ID Act of 2005 and Its Negative Impact on Asylum Seekers*, AMNESTY INT’L, at 1, Mar. 2005, available at [http://www.amnestyusa.org/uspolicy/pdf/realid\\_0305.pdf](http://www.amnestyusa.org/uspolicy/pdf/realid_0305.pdf).

roborating evidence may be required.<sup>127</sup> However, these factors are still considered at the judge's discretion.<sup>128</sup> Though testimony may be sufficient to sustain the applicant's burden, it is at the judge's discretion to require any corroborative evidence to support otherwise credible testimony.<sup>129</sup> In the past, asylum evidentiary burdens were somewhat lenient due to the difficulty in finding actual documentation of human rights abuse.<sup>130</sup> Requests for corroborating evidence places a time consuming burden on asylum seekers who have to take time to collect corroborating documents from their home country.<sup>131</sup> This can be especially burdensome for asylum seekers in detention and those with family members still in the home country in danger of persecution.<sup>132</sup>

Testimony alone will be sufficient to meet the applicant's burden only if the judge determines that the testimony is "credible, persuasive and refers to specific facts demonstrating refugee status."<sup>133</sup> Credibility is determined on factors such as demeanor, candor, responsiveness, and an inherent believability of the testimony.<sup>134</sup> Such factors can be disadvantageous, however, because they are highly subjective.<sup>135</sup> Demeanor, for

127. *See id.* at 1–2. (“[The Real ID Act] also would give immigration judges and asylum officers discretion to require corroborating information to support an asylum applicant's testimony . . . . The bill would limit the ability of any court to reverse a judge's decision to require corroborating evidence.”).

128. MICHAEL JOHN GARCIA, MARGARET MIKYUNG LEE & TODD TATELMAN, CONG. RESEARCH SERV. REPORT FOR CONG., IMMIGRATION: ANALYSIS OF THE MAJOR PROVISIONS OF THE REAL ID ACT OF 2005, at 6 (2005), available at <http://www.au.af.mil/au/awc/awcgate/crs/rl32754.pdf>.

129. Jennifer Hopkins, *Real ID Act of 2005*, U.S. VISA NEWS, Feb. 10, 2005, <http://www.usvisanews.com/articles/memo2389.shtml>.

130. *See The Real ID Act of 2005 and Its Negative Impact on Asylum Seekers*, AMNESTY INT'L, at 2, Mar. 2005, [http://www.amnestyusa.org/uspolicy/pdf/realid\\_0305.pdf](http://www.amnestyusa.org/uspolicy/pdf/realid_0305.pdf) (explaining that up until the passage of the Real ID Act, the evidentiary standards had been relaxed in recognition of the difficulty in finding documentation to corroborate human rights abuses).

131. *See id.* (noting that delays would likely have detrimental effects on those seeking asylum).

132. *Id.*

133. MICHAEL JOHN GARCIA, MARGARET MIKYUNG LEE & TODD TATELMAN, CONG. RESEARCH SERV. REPORT FOR CONG., IMMIGRATION: ANALYSIS OF THE MAJOR PROVISIONS OF THE REAL ID ACT OF 2005, at 6 (2005), available at <http://www.au.af.mil/au/awc/awcgate/crs/rl32754.pdf> (“[T]he enacted version of the Real ID Act dropped earlier language that would have further required that if the applicant could not reasonably obtain the evidence without leaving the United States, the inability to obtain corroborating evidence would not excuse the applicant from sustaining the burden of proof.”).

134. *Id.* at 7.

135. *See The Real ID Act of 2005 and Its Negative Impact on Asylum Seekers*, AMNESTY INT'L, at 2, Mar. 2005, [http://www.amnestyusa.org/uspolicy/pdf/realid\\_0305.pdf](http://www.amnestyusa.org/uspolicy/pdf/realid_0305.pdf) (explaining that up until the passage of the Real ID Act, the evidentiary standards had been

example, is a highly cultural factor.<sup>136</sup> The provision does not take into consideration different cultures.<sup>137</sup> Specifically, in Hispanic cultures, when speaking to an authority figure, eye contact is not always made.<sup>138</sup> Though this is merely a gesture of deference to someone in a higher position of authority,<sup>139</sup> a judge might misconstrue such indirectness and determine credibility on this factor alone.

The judge can also look to inconsistency, inaccuracy, and falsehood in any of the applicant's written and oral communications.<sup>140</sup> This includes any statements made at any time, whether or not the applicant was under oath.<sup>141</sup> This is problematic because most asylum seekers leave their country under circumstances that leave them confused, traumatized, disparate, and in no position to tell a full and accurate story.<sup>142</sup> To impeach an asylum applicant's sworn statement on the basis of inconsistency with their first statement would be unfair and unreasonable.<sup>143</sup> Though past case law has approved of judges taking into consideration such factors as demeanor and inconsistencies, such factors had to go to the heart of the claim in order to support an adverse credibility finding.<sup>144</sup> Under the Real ID Act, however, the judge may consider these same factors in determining credibility, regardless of whether or not they go to the root of the applicant's asylum claim.<sup>145</sup>

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relaxed in recognition of the difficulty in finding documentation to corroborate human rights abuses).

136. *See id.* (explaining how evaluation of demeanor is highly cultural).

137. Human Rights First, *Real Id Endangers People Fleeing Persecution*, [http://www.humanrightsfirst.org/asylum/asylum\\_10\\_sensenbr.asp](http://www.humanrightsfirst.org/asylum/asylum_10_sensenbr.asp) (last visited Dec. 20, 2006).

138. Neal Holladay, *Working with Hispanics*, <http://www.na.fs.fed.us/wihispanic/Working%20with%20Hispanics.pdf#search='hispanic%20mannerisms'> (last visited Dec. 20, 2006) (observing that "[t]his should not be interpreted as disinterest or defiance. In the Hispanic world, it is a sign of respect and a means of giving deference to persons in a higher position of authority . . .").

139. *Id.*

140. *The Real ID Act of 2005 and its Negative Impact on Asylum Seekers*, AMNESTY INT'L at 2, March 2005, [http://www.amnestyusa.org/uspolicy/pdf/realid\\_0305.pdf](http://www.amnestyusa.org/uspolicy/pdf/realid_0305.pdf).

141. *Id.*

142. *Id.*

143. *See id.* (citing to *Paramasamy v. Ashcroft*, 295 F.3d 1047 (9th Cir. 2002) where the court ruled that a rape victim's failure to provide the details of her rape to a male interviewer could not be considered an inconsistency and should not be assumed a lie).

144. MICHAEL JOHN GARCIA, MARGARET MIKYUNG LEE & TODD TATELMAN, CONG. RESEARCH SERV. REPORT FOR CONG., IMMIGRATION: ANALYSIS OF THE MAJOR PROVISIONS OF THE REAL ID ACT OF 2005, at 7 (2005), available at <http://www.au.af.mil/au/awc/awcgate/crs/rl32754.pdf> (citing to *Mendoza Manibao v. Ashcroft*, 329 F.3d 655 (9th Cir. 2002)).

145. *Id.* (clarifying the differences between case law out of the 9th Circuit and the provision of the Real ID Act).

Implementing such stringent asylum amendments is questionable considering the fact that the Office of United Nations High Commissioner for Refugees (UNHCR) stated that 2004 was the fourth consecutive year in which the global refugee population had dropped.<sup>146</sup> One of UNHCR's main responsibilities is to protect the rights and well-being of refugees.<sup>147</sup> Furthermore, North and South America hosted the lowest percentage of the refugee population.<sup>148</sup> Although the United States is considered one of the main countries of asylum, in 2004, the number of refugees decreased by seven percent.<sup>149</sup>

### B. *Latin American and Caribbean Refugees*

The Real ID Act is going to burden all asylum applicants seeking refuge in the United States but will be especially burdensome on Latinos. Refugees from Latin American countries have a long history of finding sanctuary in the United States. Over the past thirty years, 79,000 refugees from Latin American and Caribbean countries have found refuge in the United States.<sup>150</sup> A great majority of those refugees come from Cuba, Haiti, Nicaragua, and El Salvador.<sup>151</sup> Only 452 refugees were admitted into the United States in 2004 due to security measures already in place after September 11, 2001.<sup>152</sup>

The increased security measures come at a time when South America is amidst political unrest as a number of countries gradually move towards democratic governments, and many citizens are faced with inequality and extreme poverty.<sup>153</sup> Forty-three percent of the Latin American population lives in poverty<sup>154</sup> due to lack of employment opportunities.<sup>155</sup>

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146. UNITED NATIONS HIGH COMM'R FOR REFUGEES, 2004 GLOBAL REFUGEE TRENDS 2 (2005), available at <http://www.unhcr.org/statistics/STATISTICS/42b283744.pdf>.

147. See United Nations High Comm'r for Refugees, *Basic Facts*, <http://www.unhcr.org/basics.html> (last visited Dec. 19, 2006) (stating that the primary purpose of the United Nations High Commissioner for Refugees "is to safeguard the rights and well-being of refugees").

148. UNITED NATIONS HIGH COMM'R FOR REFUGEES, 2004 GLOBAL REFUGEE TRENDS 2-3 (2005), available at <http://www.unhcr.org/statistics/STATISTICS/42b283744.pdf>.

149. *Id.* at 3.

150. See U.S. Dep't of State, *Refugee Admissions Program for Latin America and the Caribbean*, <http://www.state.gov/g/prm/rls/fs/2004/28211.htm> (last visited Dec. 19, 2006) (tracing the history of Latin American and Caribbean refugees since 1975).

151. *Id.*

152. *Id.*

153. See Monte Hayes, *UN: Latin America Democracy in Trouble*, ASSOCIATED PRESS, Apr. 4, 2004 (discussing the political and economic climate of Latin America during its transition to democracy).

154. Juan Forero, *Latin America Graft and Poverty Trying Patience with Democracy*, N.Y. TIMES, June 24, 2004, at A1.

South America, Central America, and the Caribbean are burdened with at-risk governments.<sup>156</sup> One of the most at-risk countries is Guatemala where “paramilitary groups, youth gangs and judicial impunity has become a crossroads for the smuggling of people and drugs into the United States.”<sup>157</sup> The Real ID Act, unfortunately, leaves Latin American citizens with few alternatives in seeking refuge.

As a global superpower, “America is an example to many countries of the world. Much of the world has now embraced and affirmed values consistent with the American ideals including promoting democracy, developing market economies, protecting human rights and preserving our earth’s environment.”<sup>158</sup> Now other countries may choose to follow the United States’ example and enact their own stringent immigration laws. Supporters of the Real ID Act claim it is aimed at the safety and security of the United States. Although the safety of United States citizens is a laudable goal, the long-term effects of such legislation could be devastating. If other countries will not allow refugees asylum, the United States may become confronted with even more illegal immigration.<sup>159</sup> An increase in illegal immigration is counter-productive to ensuring the safety and security of United States citizens because it results in more unidentified individuals within the nation’s borders. It also places in jeopardy the lives of thousands of Latino immigrants who risk their lives to escape from corrupt government and poverty.

### C. *Barriers at Borders*

Since 1996, section 102 of the Illegal Immigrant Reform and Immigrant Responsibility Act of 1996 (IIRIRA) allowed for construction of barriers along land borders with a high number of illegal immigrants crossing.<sup>160</sup> This act specifically singled out the border with Mexico, allowing for four-

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155. Monte Hayes, *UN: Latin America Democracy in Trouble*, ASSOCIATED PRESS, Apr. 4, 2004.

156. Juan Forero, *Latin America Graft and Poverty Trying Patience with Democracy*, N.Y. TIMES, June 24, 2004, at A1.

157. *Id.*

158. See RICHARD STANLEY, THE STANLEY FOUNDATION, THE UNITED STATES AS A WORLD LEADER 1 (1996), available at <http://www.stanleyfoundation.org/reports/SPC96A.pdf> (analyzing how the United States has shaped global attitudes about politics and economics).

159. Juan Forero, *Latin America Graft and Poverty Trying Patience with Democracy*, N.Y. TIMES, June 24, 2004, at A1.

160. MICHAEL JOHN GARCIA, MARGARET MIKYUNG LEE & TODD TATELMAN, CONG. RESEARCH SERV. REPORT FOR CONG., IMMIGRATION: ANALYSIS OF THE MAJOR PROVISIONS OF THE REAL ID ACT OF 2005, at 15 (2005), available at <http://www.au.af.mil/au/awc/awcgate/crs/r132754.pdf>.

teen miles of barrier to be constructed in the San Diego area.<sup>161</sup> Section 102(c) of the IIRIRA also provided for waiver of the Endangered Species Act of 1973 (ESA)<sup>162</sup> and the National Environmental Policy Act of 1969 (NEPA).<sup>163</sup> Waiver of such legislation is done at the Attorney General's discretion—to the extent he determines necessary for the prompt construction of barriers.<sup>164</sup> Despite these allowances, construction of the barrier along San Diego was delayed.<sup>165</sup> The delay was due to concerns raised by California's Coastal Commission.<sup>166</sup> Plans to complete the barriers, including filling a canyon, were inconsistent with the California Coastal Management Program.<sup>167</sup> The California Coastal Management Program is responsible for the protection and management of California's Coastal resources.<sup>168</sup>

Under Section 102 of the Real ID Act, the power to waive *all* legal requirements, deemed necessary to ensure the expeditious construction of barriers along the United States land borders, is transferred from the Attorney General to the Secretary of Homeland Security.<sup>169</sup> The ability to waive any legal requirements includes waiving any local, state, and federal statute.<sup>170</sup> This broad spectrum of laws includes anything from employment laws to laws prohibiting construction on sacred burial grounds.<sup>171</sup> The legislation also imposes federal judicial review for any

161. *Id.*

162. *See* The Endangered Species Act of 1973 § 2, 16 U.S.C. § 1531 (West 2006) (protecting seriously endangered species from extinction due to development without caution, concern, or conservation).

163. National Environmental Policy Act of 1969 § 2, 42 U.S.C. § 4321 (West 2006). The purpose of the act is to create national policy that will encourage enjoyment of harmony between man and the environment, promote efforts that will eliminate damage to the environment, and to “stimulate the health and welfare of man . . . .” *Id.*

164. MICHAEL JOHN GARCIA, MARGARET MIKYUNG LEE & TODD TATELMAN, CONG. RESEARCH SERV. REPORT FOR CONG., IMMIGRATION: ANALYSIS OF THE MAJOR PROVISIONS OF THE REAL ID ACT OF 2005, at 15 (2005), *available at* <http://www.au.af.mil/au/awc/awcgate/crs/r132754.pdf>.

165. *Id.* (approving the California Coastal Management Program through the federally mandated Coastal Zone Management Act).

166. *Id.*

167. *Id.*

168. *See* U.S. Dep't of Commerce, Nat'l Oceanic Atmospheric Admin., *Ocean and Coastal Management in California*, <http://coastalmanagement.noaa.gov/mystate/ca/html> (last visited Jan. 14, 2007).

169. MICHAEL JOHN GARCIA, MARGARET MIKYUNG LEE & TODD TATELMAN, CONG. RESEARCH SERV. REPORT FOR CONG., IMMIGRATION: ANALYSIS OF THE MAJOR PROVISIONS OF THE REAL ID ACT OF 2005, at 16 (2005), *available at* <http://www.au.af.mil/au/awc/awcgate/crs/r132754.pdf>.

170. *Id.*

171. *See* HOUSE JUDICIARY COMM. DEMOCRATIC STAFF, THREE STRIKES AGAINST THE SO-CALLED REAL ID ACT (H.R. 418): BAD FOR NATIONAL SECURITY, BAD FOR

constitutional claims brought on the basis of the Secretary's waiver authority.<sup>172</sup> There are currently two fences in the San Diego area, and statistics show that migration has dropped in those areas by seventy-five percent.<sup>173</sup> The fence mandated by the Real ID Act is to be built in the urban area of San Diego, while the vast majority of the remaining migration continues to enter through the mountainous areas.<sup>174</sup> Hence, the completion of the fence may not be the wisest and most efficient use of taxpayers' dollars.

Numbers gathered by the Border Patrol show that building the fence in San Diego did not result in a decrease in the number of illegal immigrants.<sup>175</sup> "Poor living conditions, high levels of unemployment, poverty, political unrest, overcrowding and government oppression plague many Latin American countries and are push factors that fuel both legal and illegal immigration into the United States."<sup>176</sup> Considering the high number of immigrants that leave their home country for better opportunities, it is unlikely that construction of fences will deter immigrants from crossing illegally into the United States. Immigrants, such as those from Latin America, have risked their lives and spent their life savings for an opportunity to start a life in the United States. "[C]ommon sense dictates that Latin American immigration, even if restricted, is sure to persist."<sup>177</sup>

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CIVIL LIBERTIES, BAD FOR VICTIMS OF PERSECUTION 13 (2005), available at [http://www.house.gov/judiciary\\_democrats/hr418debate109cong/demhr418views2905.pdf#search='mexican%20american%20bar%20association%20the%20real%20id%20act'](http://www.house.gov/judiciary_democrats/hr418debate109cong/demhr418views2905.pdf#search='mexican%20american%20bar%20association%20the%20real%20id%20act') (analyzing the effects that the Real ID Act will have on asylum applicants and on the ability for immigrants to get driver's licenses). The report argues that the Real ID Act will essentially broaden the reasons to keep immigrants out of the U.S. and deport immigrants currently in the U.S. *Id.*

172. MICHAEL JOHN GARCIA, MARGARET MIKYUNG LEE & TODD TATELMAN, CONG. RESEARCH SERV. REPORT FOR CONG., IMMIGRATION: ANALYSIS OF THE MAJOR PROVISIONS OF THE REAL ID ACT OF 2005, at 16 (2005), available at <http://www.au.af.mil/au/awc/awcgate/crs/r132754.pdf>.

173. *Id.*

174. Latin American Working Group, *Stop Border Fencing Now! Talking Points*, [http://www.lawg.org/countries/mexico/january\\_talking\\_points.htm](http://www.lawg.org/countries/mexico/january_talking_points.htm) (last visited Dec. 21, 2006).

175. HOUSE JUDICIARY COMM. DEMOCRATIC STAFF, THREE STRIKES AGAINST THE SO-CALLED REAL ID ACT (H.R. 418): BAD FOR NATIONAL SECURITY, BAD FOR CIVIL LIBERTIES, BAD FOR VICTIMS OF PERSECUTION 13 (2005), available at [http://www.house.gov/judiciary\\_democrats/hr418debate109cong/demhr418views2905.pdf#search='mexican%20american%20bar%20association%20the%20real%20id%20act'](http://www.house.gov/judiciary_democrats/hr418debate109cong/demhr418views2905.pdf#search='mexican%20american%20bar%20association%20the%20real%20id%20act').

176. Ryan D. Frei, Comment, *Reforming U.S. Immigration Policy in an Era of Latin American Immigration: The Logic Inherent in Accommodating the Inevitable*, 39 U. RICH. L. REV. 1355, 1391 (2005) (quoting JoAnne D. Spotts, *U.S. Immigration Policy on the Southwest Border from Reagan Through Clinton, 1981 - 2001*, 16 GEO. IMMIGR. L.J. 601, 617).

177. *See id.* at 1391 (discussing the economic disparities between Latin American countries and the U.S. and how Latin political leaders encourage illegal immigration).



Fencing will not deter illegal immigration.<sup>178</sup> To the contrary, the former INS estimated that in 2002, the number of undocumented immigrants increased over 100,000.<sup>179</sup>

The construction of barriers in areas such as California will push immigrants towards dangerous desert areas of Arizona and New Mexico, putting their lives further at risk.<sup>180</sup> One immediate impact of the Real ID Act would clear seventy-five miles of the Arizona border for construction of barriers.<sup>181</sup> Fencing in this area would run through environmentally sensitive areas and funnel immigrants towards the dangerous areas of the Barry Goldwater Air Force bombing range.<sup>182</sup> In 2004, 221 immigrants died in Arizona alone attempting to cross dangerous desert areas in order to avoid fencing and other Border Patrol infrastructure.<sup>183</sup> Not only has fencing along the border been proven ineffective, it has come at a high cost. It is estimated that the Triple Fence in San Diego cost about \$3 million per mile to construct. But financial costs are not the only costs involved in fencing along the border.<sup>184</sup> Other serious costs include lives lost in attempting to cross dangerous areas and increased criminal activity and violence due to desperate attempts of human smuggling across United States borders.<sup>185</sup>

#### D. *Driver's License Regulations*

Certain provisions of the Intelligence Reform and Terrorism Prevention Act of 2004 (IRTP Act) made changes to the driver's licenses and identification cards standards, which imposed some national regulation, but remained largely state regulated.<sup>186</sup> Prior to the IRTP Act, standards for driver's licenses were strictly regulated on a state-by-state basis with

178. *Id.*

179. *Id.*

180. HOUSE JUDICIARY COMM. DEMOCRATIC STAFF, THREE STRIKES AGAINST THE SO-CALLED REAL ID ACT (H.R. 418): BAD FOR NATIONAL SECURITY, BAD FOR CIVIL LIBERTIES, BAD FOR VICTIMS OF PERSECUTION 14 (2005), available at [http://www.house.gov/judiciary\\_democrats/hr418debate109cong/demhr418views2905.pdf#search='mexican%20american%20bar%20association%20the%20real%20id%20act'](http://www.house.gov/judiciary_democrats/hr418debate109cong/demhr418views2905.pdf#search='mexican%20american%20bar%20association%20the%20real%20id%20act').

181. See Latin American Working Group, *Stop Border Fencing Now! Talking Points*, [http://www.lawg.org/countries/mexico/january\\_talking\\_points.htm](http://www.lawg.org/countries/mexico/january_talking_points.htm) (last visited Dec. 20, 2006) (discussing the negative impact on immigrants under the Real ID Act).

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

186. See MICHAEL JOHN GARCIA, MARGARET MIKYUNG LEE & TODD TATELMAN, CONG. RESEARCH SERV. REPORT FOR CONG., IMMIGRATION: ANALYSIS OF THE MAJOR PROVISIONS OF THE REAL ID ACT OF 2005, at 38 (2005), available at <http://www.au.af.mil/au/awc/awcgate/crs/rl32754.pdf> (discussing the Intelligence Reform and Terrorism Prevention Act which states that driver's licenses standards were mandated in order to facilitate

no national standards in place.<sup>187</sup> The Real ID Act imposes additional national standards on driver's licenses and identification cards designed to improve security.<sup>188</sup> The Real ID Act also provides instructions and penalties for those states that do not comply with the federally mandated regulations.<sup>189</sup> These provisions include repealing some conflicting laws of the IRTP Act of 2004.<sup>190</sup>

The IRTP Act of 2004 assigned authority to the Secretary of Transportation, in conjunction with the Secretary of Homeland Security, to develop minimum standards for federal acceptance of driver's licenses.<sup>191</sup> In accordance with the IRTP Act, the Secretary had to impose regulations that required a person's driver's license to include their full legal name, date of birth, gender, driver's license number, digital photograph, address, and signature to be accepted by any federal agency for an official purpose.<sup>192</sup> Driver's licenses and identification cards were further required to possess certain technological security features designed to prevent tampering, duplication, and counterfeiting.<sup>193</sup> States were also instructed to confiscate any driver's licenses that did not meet such security standards.<sup>194</sup> States were also required to implement regulations dealing with the documentation necessary to obtain a driver's license, the procedures used to validate the documentation, and standards for processing driver's license applications.<sup>195</sup> The IRTP Act did, however,

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communication between the state driver's license officials and any appropriate federal officials).

187. *Id.*

188. *Id.*

189. *Id.*

190. *See id.* at 38–39 (highlighting the Real ID Act's improvement in the security of driver's licenses and identification cards).

191. *See* MICHAEL JOHN GARCIA, MARGARET MIKYUNG LEE & TODD TATELMAN, CONG. RESEARCH SERV. REPORT FOR CONG., IMMIGRATION: ANALYSIS OF THE MAJOR PROVISIONS OF THE REAL ID ACT OF 2005, at 38 (2005), available at <http://www.au.af.mil/au/awc/awcgate/crs/r132754.pdf> (providing standards for the federal government to follow rather than the states). Whether the Act's limitation of applying the standards only to the federal government rather than to the states is a violation of the Commerce Clause remains unknown. *Id.* at 38–39 n.120.

192. *See id.* at 39 (describing the 18-month time span after the enactment of the IRTP Act accorded to the Secretary to issue the regulations (citing the Immigration Reform and Terrorism Protection Act, Pub. L. No. 108-458, § 7212(b)(2)(D)(i)-(vii))).

193. *See id.* (describing that the technological features must comply with familiar machine-readable technology (citing Pub. L. No. 108-458, § 7212(b)(2)(E)-(F))).

194. *See id.* (adding that the state must also confiscate personal identification cards failing to comply with the security components (citing Pub. L. No. 108-458, § 7212(b)(2)(G))).

195. *See id.* (explaining that the IRTP Act required the regulations to describe how driver's licenses were distributed by the states (citing Pub. L. No. 108-458, § 7212(b)(2)(A)-(C))).

specifically state that such requirements should not infringe on a state's power to set their own standards regarding which individuals are granted driver's licenses in each state.<sup>196</sup> This meant that if a state granted a driver's license to a certain class of persons, nothing in the IRTP Act could prevent them from continuing this practice.<sup>197</sup> The IRTP Act also allowed for standards to protect the privacy rights of individuals.<sup>198</sup>

"The Real ID Act does not directly impose federal standards with respect to states' issuance of driver's licenses . . . [but] states nevertheless appear to have [a] need to adopt such standards and modify any conflicting laws or regulations in order for such documents to be recognized by federal agencies for official purposes."<sup>199</sup> "Official purposes" is defined by the Real ID Act as "accessing Federal facilities, boarding federally regulated commercial aircraft, entering nuclear power plants, and any other purposes that the Secretary of Homeland Security shall determine."<sup>200</sup> The Real ID Act abolishes Section 7212 of the IRTP Act, which contained the national standards already in place for state issuance of driver's licenses.<sup>201</sup> This essentially repealed the provision in the IRTP Act that prohibited any national standards from infringing on a state's power to set their own standards as to which individuals are granted driver's licenses. Section (c) of the Real ID Act mandates federal mini-

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196. See MICHAEL JOHN GARCIA, MARGARET MIKYUNG LEE & TODD TATELMAN, CONG. RESEARCH SERV. REPORT FOR CONG., IMMIGRATION: ANALYSIS OF THE MAJOR PROVISIONS OF THE REAL ID ACT OF 2005, at 39 (2005), available at <http://www.au.af.mil/au/awc/awcgate/crs/rl32754.pdf> (discussing the Intelligence Reform and Terrorism Prevention Act which states that driver's licenses standards were mandated in order to facilitate communication between the state driver's license officials and any appropriate federal officials). "The regulations were, however, prohibited not only infringing upon the 'State's power to set criteria concerning what categories of individuals are eligible to obtain a driver's license or personal identification card from that State . . . but also from requiring a state to take an action that 'conflicts with or otherwise interferes with the full enforcement of state criteria concerning the categories of individuals that were eligible to obtain a driver's license or personal identification card.'" *Id.* (quoting Pub. L. No. 108-458, § 7212(b)(3)(C)).

197. *Id.* (referring to classes such as aliens, legal or illegal).

198. See *id.* (adding that the regulations did not require uniformity in design (citing Pub. L. No. 108-458, § 7212(b)(3)(D)-(E))).

199. See *id.* at 40 (providing a general overview of the changes created by the Real ID Act).

200. See *id.* (highlighting that the definition is not limited to the purposes listed).

201. See MICHAEL JOHN GARCIA, MARGARET MIKYUNG LEE & TODD TATELMAN, CONG. RESEARCH SERV. REPORT FOR CONG., IMMIGRATION: ANALYSIS OF THE MAJOR PROVISIONS OF THE REAL ID ACT OF 2005, at 40 (2005), available at <http://www.au.af.mil/au/awc/awcgate/crs/rl32754.pdf> (noting that the Real ID Act includes a specific provision that annuls § 7212 of the IRTP Act).

minimum standards on states before they can issue a driver's license.<sup>202</sup> Before a state can issue a driver's license, the state will have to verify with the issuing agency, the issuance, validity and completeness of (1) a photo identification document or a non-photo document containing both the individual's full legal name and date of birth; (2) date of birth; (3) proof of a social security number (SSN) or verification of the individual's ineligibility for a SSN; and (4) name and address of the individual's principal residence.<sup>203</sup>

Verification requirements such as those imposed by the Real ID Act already existed, but they were solely state regulated.<sup>204</sup> This Real ID Act provision preempts the state verification requirements with federal requirements.<sup>205</sup>

Not only does the Real ID Act mandate states to perform federally regulated procedures, it also imposes upon states functions of immigration. Specifically, Section 202(c)(2)(B) of the Real ID Act requires states to verify the legal status of an applicant in the United States before issuing an applicant a driver's license.<sup>206</sup> To coincide with the legal status requirement, Section 203(c)(2)(C) of the Real ID Act develops a system of temporary driver's licenses and identification cards for any legal immigrants present in the United States under various temporary immigration programs.<sup>207</sup> Under this provision, the state may only issue a driver's license for the amount of time an applicant is legally authorized to remain in the United States.<sup>208</sup> The temporary driver's license or identification

202. *See id.* (discussing the establishment of standards for state driver's license issuance to enable recognition by federal agencies).

203. *Id.*

204. *See id.* (noting that, although the Real ID Act does not impose federal standards on states in the issuance of driver's licenses, states are compelled to adopt such standards in order to comply with the Act).

205. *See id.* (stating that the final version of the bill made more stringent Real ID Act provisions regarding minimum standards for state driver's licenses accepted for federal purposes).

206. *See* MICHAEL JOHN GARCIA, MARGARET MIKYUNG LEE & TODD TATELMAN, CONG. RESEARCH SERV. REPORT FOR CONG., IMMIGRATION: ANALYSIS OF THE MAJOR PROVISIONS OF THE REAL ID ACT OF 2005, at 40–41 (2005), available at <http://www.au.af.mil/au/awc/awcgate/crs/rl32754.pdf> (discussing the Intelligence Reform and Terrorism Prevention Act which states that driver's licenses standards were mandated in order to facilitate communication between the state driver's license officials and any appropriate federal officials).

207. *See id.* at 39 (indicating that the final version of the Act removed provisions relevant to releasing aliens through removal proceedings on bond).

208. *See id.* (establishing that a person may only be issued a temporary driver's license if they meet stringent criteria based on having a visa, having a valid or pending application for asylum, the individual's refugee status, having a valid or pending application for pro-

card must clearly show that it is temporary and must also state the expiration date.<sup>209</sup>

These provisions place detrimental burdens on non-citizens. The inability to drive is more than a mere inconvenience in many cities across the country.<sup>210</sup> Public transportation is not available everywhere twenty-four hours a day, and some cities do not offer public transportation at all.<sup>211</sup> Lack of public transportation is especially prominent in rural areas where many immigrants settle.<sup>212</sup> Driving in these regions is not a privilege, but rather, a necessity to perform daily activities associated with living such as working, buying groceries, and seeking medical care.<sup>213</sup> Driver's licenses are also necessary to conduct regular business transactions.<sup>214</sup> Once the Real ID Act provisions are implemented, only state licenses that comply with the legislation will be accepted to apply for a passport, pass through an airline ticket counter, or open a bank account.<sup>215</sup> Denying driver's licenses will deny non-citizens an identity and "exacerbates their underclass status . . . ."<sup>216</sup>

Again, it is evident that the provisions of the Real ID Act will seriously harm Latino immigrants who make up the majority of the immigrant pop-

tected status, having a deferred action status, or having a valid or pending application for lawfully admitted resident alien status).

209. *See id.* at 40–41 (noting that the renewal of such temporary licenses are only to be done under the authority of the Secretary of Homeland Security).

210. *See* Raquel Aldana & Sylvia Lazos Vargas, "Aliens" in *Our Midst Post-9/11: Legislating Outsiderness Within the Borders*, 38 U.C. DAVIS L. REV. 1683, 1709 (2005) (reviewing BILL ONG HING, *DEFINING AMERICA THROUGH IMMIGRATION POLICY (MAPPING RACISMS SERIES)* (2003); KEVIN R. JOHNSON, *THE "HUDDLED MASSES" MYTH: IMMIGRATION AND CIVIL RIGHTS* (2003); and VICTOR C. ROMERO, *ALIENATED: IMMIGRATION RIGHTS, THE CONSTITUTION, AND EQUALITY IN AMERICA* (2004)) (arguing that the denial of driver's licenses raises similar issues to those who were denied higher education by the government because of their undocumented status in pursuit of homeland security).

211. *See id.* (stating that the debate over the issuance of driver's licenses has been incorrectly framed as an illegal immigration problem).

212. *See id.* (describing the inconveniences attached to failing to obtain a driver's license which affect not only those living in cities).

213. *See id.* (cautioning that the effects of license-issuing policies arguably exacerbate the underclass status of many who are affected by the policies).

214. *See id.* (warning that failing to discuss the human cost of license-issuing policies arguably comes about as a result of foreignness being equated with disloyalty).

215. Phil Magers, *Analysis: States Might Challenge Real ID Act*, UNITED PRESS INT'L, May 12, 2005.

216. *See* Raquel Aldana & Sylvia Lazos Vargas, "Aliens" in *Our Midst Post-9/11: Legislating Outsiderness Within the Borders*, 38 U.C. DAVIS L. REV. 1683, 1709–10 (2005) (reviewing BILL ONG HING, *DEFINING AMERICA THROUGH IMMIGRATION POLICY (MAPPING RACISMS SERIES)* (2003); KEVIN R. JOHNSON, *THE "HUDDLED MASSES" MYTH: IMMIGRATION AND CIVIL RIGHTS* (2003); and VICTOR C. ROMERO, *ALIENATED: IMMIGRATION RIGHTS, THE CONSTITUTION, AND EQUALITY IN AMERICA* (2004)).

ulation.<sup>217</sup> The Real ID Act not only affects aliens illegally present in the United States, but also adversely affects immigrants attempting to obtain legal presence in the United States.<sup>218</sup> States will not be able to grant immigrants a driver's license until they show they are present in the United States legally. Under the Real ID Act, millions of Latino immigrants will be left without driver's licenses, will be denied access to federal services, and will be unable to access any federal buildings that require a federally approved identification card.<sup>219</sup> More specifically, Mexican immigrants will no longer be able to use a *matricula consular*<sup>220</sup> to access the few services available to them such as obtaining a valid driver's license.<sup>221</sup> The number of unauthorized residents in the United States from Mexico was estimated at 4.8 million in January 2000.<sup>222</sup> The Real ID Act would deny proper identification to millions of people currently living in the United States. Such actions would be a step backward in increasing security in the United States. The purpose of the Real ID Act is national security, but this heightened awareness for national security is made at the expense of public safety and rights accorded to people

217. U.S. CITIZEN AND IMMIGRATION SERVICE, ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: 1990–2000 (2003) (on file with author). Out of millions of illegal immigrants present in the United States, Mexico is the largest source of unauthorized immigration. *Id.* Aside from Mexico, six other countries had significant numbers of illegal immigrants in the United States. *Id.* Five out of the six countries were Latin American countries. *Id.* The countries listed were El Salvador, Guatemala, Colombia, Honduras, China, and Ecuador. *Id.*

218. See Katherine Culliton, *In the Aftermath of September 11: Defending Civil Liberties in the Nation's Capital: The Treatment of Immigrants: How Racial Profiling and Other Unnecessary Post-9/11 Anti-Immigrant Measures Have Exacerbated Long-Standing Discrimination Against Latino Citizens and Immigrants*, 8 UDC/DCSL. L. REV. 141, 147 (2004) (“Family-and employer-sponsored visas from Mexico have current backlogs of ten years.”). Citizens and legal permanent residents who wish to reunite with their families have to wait those ten years or risk immigrating their families to the United States illegally. *Id.*

219. See Jennifer Hopkins, *Real ID Act of 2005*, U.S. VISA NEWS, Feb. 10, 2005, available at <http://www.usvisanews.com/articles/memo2389.shtml> (discussing the prohibition of federal agencies from accepting identification that does not comply with the requirements).

220. Kevin O'Neil, *Consular ID Cards: Mexico and Beyond*, MIGRATION INFORMATION SOURCE, Apr. 1, 2003, <http://www.migrationinformation.org/USfocus/display.cfm?ID=115>. The *matricula consular* is a Mexican government identity document that has served as sufficient identification for immigrants to perform routine functions that require identification, such as opening bank accounts. *Id.*

221. *Id.* (“A sharp debate on the merits of Consular ID's has engaged the public, political circles, the media, the private sector, immigration authorities, and law enforcement agencies.”). Proponents of the Consular ID's argue that the cards allow immigrants to “open bank accounts, access some limited public services, and work with authorities to resolve crimes and other social ills.” *Id.*

222. U.S. Citizenship and Immigration Services, *Estimates of the Unauthorized Immigrant Population Residing in the United States 1990–2000* (on file with author).

within the United States. Licensed drivers have a much better understanding of the rules of the road and they are able to obtain insurance, which makes the streets safer for everyone.<sup>223</sup> Furthermore, the Real ID Act does away with a key law enforcement tool in driver's licenses databases which is often used to track down criminals.<sup>224</sup>

States that continue to issue driver's license or identification cards that do not comply with the federal standards are required to use a unique color or design in order to alert officials of noncompliance and that the document is not to be used for any official purpose.<sup>225</sup> Such requirements have strong discriminatory implications considering that, according to the United States Constitution, no person within its jurisdiction shall be denied the equal protection of the laws.<sup>226</sup>

[U]ndocumented noncitizens do not cease to be persons by virtue of their status as "illegals." Noncitizens should have access to those things which are essential to the expression of their humanity and provide a means to their subsistence. . . . [P]lyler v. Doe's concept of the due process guarantee would reason that the government should not withdraw benefits that would isolate noncitizens and exacerbate their underclass status.<sup>227</sup>

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223. See ALISON M. SMITH, CONG. RESEARCH SERV., REPORT FOR CONG., SUMMARY OF STATE LAWS ON THE ISSUANCE OF DRIVER'S LICENSES 1 (2003), available at [http://www.eimmlaw.com/articles/CRS\\_report\\_stateDriverLicenses.pdf](http://www.eimmlaw.com/articles/CRS_report_stateDriverLicenses.pdf) (concluding that the issuing of driver's licenses to illegal aliens is not only a matter of national security but also public safety).

224. See National Council of La Raza, *NCLR Condemns Passage of the Real ID Act*, May 10, 2005, <http://nclr.org/content/news/detail/31270> (arguing that the Real ID Act will make many drivers ineligible for a driver's license and will discourage others from seeking a driver's license).

225. MICHAEL JOHN GARCIA, MARGARET MIKYUNG LEE & TODD TATELMAN, CONG. RESEARCH SERV., REPORT FOR CONG., IMMIGRATION: ANALYSIS OF THE MAJOR PROVISIONS OF THE REAL ID ACT OF 2005, at 39 (2005), available at <http://www.au.af.mil/au/awc/awcgate/crs/rl32754.pdf>.

226. U.S. CONST. amend. XIV, § 1.

227. See Raquel Aldana & Sylvia Lazos Vargas, "Aliens" in Our Midst Post-9/11: Legislating Outsiderness Within the Borders, 38 U.C. DAVIS L. REV. 1683, 1720 (2005) (reviewing BILL ONG HING, *DEFINING AMERICA THROUGH IMMIGRATION POLICY (MAPPING RACISMS SERIES)* (2003); KEVIN R. JOHNSON, *THE "HUDDLED MASSES" MYTH: IMMIGRATION AND CIVIL RIGHTS* (2003); and VICTOR C. ROMERO, *ALIENATED: IMMIGRATION RIGHTS, THE CONSTITUTION, AND EQUALITY IN AMERICA* (2004)) (supporting the reasoning that unlike the right to work, a driver's license is a right to an identity and not merely a privilege)).

## IV. PROPOSED RECOMMENDATION

With such rigorous security checks and extensive governmental databases in place, the government should be more than capable of identifying possible threats to national security without having to further burden asylum applicants. The government should look to possible internal changes that could be made before further increasing the barriers between asylum applicants and a safe haven in the United States.

The need for enhanced security is clear in this post-September 11 world . . . [b]ut when some of the new immigration enforcement measures that have been labeled as promoting ‘national’ or ‘homeland’ security are examined more closely, too often, fundamental fairness and basic protections have been sacrificed without a meaningful assessment of whether the particular change is actually needed to protect this country. The conduct of a fair asylum process and the maintenance of security are objectives that can both be met. The former need not be sacrificed to the latter.<sup>228</sup>

Many government officials strongly argue national security in support of the anti-immigrant legislation in the Real ID Act. They further urge that despite the great burdens the legislation places on immigrants, it is for the benefit of the entire country.<sup>229</sup> “The sacrifice of the few is worth the well-being of the many.”<sup>230</sup> “This argument might be more persuasive if the government could show that the terms ‘terrorist’ and ‘immigration violator’ are synonymous, or that there is a high correlation between the two.”<sup>231</sup> Strict analysis of Congressional legislation is vital when the government is attempting to impede on individual civil liberties in exchange for national security. Some scholars have commented that fear of another terrorist attack is what causes decisions makers to “underestimate the value of the civil liberties at stake.”<sup>232</sup> This analysis involves balancing the government’s interest in national security with the burden it places on the individual.

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228. Archana Pyati & Eleanor Acer, *In Liberty's Shadow: U.S. Detention of Asylum Seekers in the Era of Homeland Security*, HUMAN RIGHTS FIRST (2004), available at [http://www.humanrightsfirst.org/asylum/libertys\\_shadow/Libertys\\_Shadow.pdf#search='In%20Liberty%E2%80%99s%20Shadow%3A%20U.S.%20Detention%20of%20Asylum%20Seekers%20in%20the%20Era%20of%20Homeland%20Security'](http://www.humanrightsfirst.org/asylum/libertys_shadow/Libertys_Shadow.pdf#search='In%20Liberty%E2%80%99s%20Shadow%3A%20U.S.%20Detention%20of%20Asylum%20Seekers%20in%20the%20Era%20of%20Homeland%20Security').

229. See VICTOR C. ROMERO, *ALIENATED: IMMIGRANTS RIGHTS, THE CONSTITUTION AND EQUALITY IN AMERICA* 39 (2005) (critiquing the government’s use of immigration law and its effectiveness as an anti-terrorist device).

230. *Id.*

231. *Id.*

232. Robert M. Chesney, *Civil Liberties and the Terrorism Prevention Paradigm: The Guilt by Association Critique*, 101 MICH. L. REV. 1408, 1414 (2003).



Asylum law before September 11, 2001, already made it difficult for anyone seeking asylum in the United States.<sup>233</sup> As stated before, asylum law is mainly governed under the Immigration and Naturalization Act,<sup>234</sup> which was later amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996.<sup>235</sup> Asylum law that was in place before the passage of the Real ID Act already prohibited asylum to anyone who posed a security risk or was a suspected terrorist.<sup>236</sup> Specifically, asylum is denied to any person who

1. has been convicted of a particularly serious crime, including any of the broad range of crimes designated as aggravated felonies under the immigration laws, and constitutes a danger to the community;
2. has committed a serious nonpolitical crime abroad;
3. is or may reasonably be considered a danger to the security of the United States; or
4. has engaged in terrorist activity.<sup>237</sup>

Extensive security checks are also required under the INA. This security check includes checking the asylum applicant's names and birth dates against INS databanks as well as several other databanks operated by the FBI, CIA, and the State Department.<sup>238</sup> Fingerprints are also taken and given to the FBI for the purposes of conducting a criminal background check.<sup>239</sup> The fingerprints are also used in IDENT, a special immigration database that compares an applicant's fingerprints with those of other ap-

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233. Human Rights First, *New Report from U.S. Religious Freedom Commission Exposes Barriers Facing Refugees*, [http://www.humanrightsfirst.org/media/2005\\_alerts/asy\\_0208\\_relig.htm](http://www.humanrightsfirst.org/media/2005_alerts/asy_0208_relig.htm) (last visited Dec. 15, 2006) (quoting the Director of Human Rights First's Asylum Program as saying "[t]his report confirms just how difficult it already is for refugees who flee from religious and other persecution to navigate their way through the U.S. asylum system . . . . Ironically, the House [was] scheduled to vote . . . on a bill that would make these problems even worse.")

234. U.S. Citizen and Immigration Service, *Making Immigration Law* (on file with author).

235. MICHAEL JOHN GARCIA, MARGARET MIKYUNG LEE & TODD TATELMAN, CONG. RESEARCH SERV. REPORT FOR CONG., IMMIGRATION: ANALYSIS OF THE MAJOR PROVISIONS OF THE REAL ID ACT OF 2005, at 39 (2005), available at <http://www.au.af.mil/au/awc/awcgate/crs/rl32754.pdf>.

236. Human Rights First, *Real ID Endangers People Fleeing Persecution*, [http://www.humanrightsfirst.org/asylum/asylum\\_10\\_sensenbr.asp](http://www.humanrightsfirst.org/asylum/asylum_10_sensenbr.asp) (last visited Dec. 20, 2006).

237. See Human Rights First, *Security Procedures in the U.S. Asylum System*, Aug. 2004, available at <http://www.humanrightsfirst.org/asylum/pdf/asylumsecurity.pdf> (illustrating the discriminatory nature of the post-September 11 immigration reform in the United States).

238. *Id.*

239. *Id.*

plicants who have applied for asylum since 1998.<sup>240</sup> This process guards against people who may attempt to apply for asylum more than once under a different name.<sup>241</sup> Another extensive database in use is the National Automated Immigration Lookout System (NAILS).<sup>242</sup> “NAILS is an inter-agency database that includes important data from the Department of State and other agencies, including information about suspected terrorists.”<sup>243</sup> NAILS provides information such as immigration history, file location, application benefits, and any detention and deportation issues.<sup>244</sup> Finally, NAILS includes information on anyone who has been placed on “lookout” because “there is confirmed case information that may exclude the individual from entering the country or there is potential information, which the agency is seeking to confirm, that may exclude the individual from entry into the country.”<sup>245</sup>

The issuance of driver’s licenses should remain a strictly local state issue. As the Supreme Court held in *Printz v. United States*, using the states as instruments of federal governance is both ineffectual and provocative of federal-state conflict.<sup>246</sup> Requirements imposed under the Real ID Act will force federal service on state officers, and such congressional action is plainly unconstitutional.<sup>247</sup> Congress did not allow enough time after the passage of the IRTP Act for it to take its course before supplementing the legislation with the more extreme and anti-immigrant provisions of the Real ID Act. Supporters of the Real ID Act overlooked the fact that many states favored the approach mandated in the IRTP Act.<sup>248</sup> The IRTP Act set up a committee of experts to work with states on a local level to improve their driver’s license standards.<sup>249</sup> Furthermore, many states were already on their way to improving standards on their own.<sup>250</sup>

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240. *Id.*

241. *Id.*

242. Human Rights First, *Security Procedures in the U.S. Asylum System*, Aug. 2004, available at <http://www.humanrightsfirst.org/asylum/pdf/asylumsecurity.pdf>.

243. *Id.*

244. *Id.*

245. *Id.*

246. See *Printz v. United States*, 521 U.S. 898 (1997) (discussing Congress’s passage of the Brady Act of 1993 which required the Attorney General to establish a national background check). Under the provision, state and local officers would have to perform background checks before issuing firearms. *Id.* The Court found the provisions of the Brady Act to be unconstitutional in that Congress could not compel the states to enforce or enact a federal regulatory program. *Id.*

247. *Id.* at 935.

248. See Phil Magers, *Analysis: States Might Challenge Real ID Act*, UNITED PRESS INT’L, May 12, 2005 (emphasizing the states own efforts to tighten security in post-9/11).

249. *Id.*

250. *Id.*

## V. CONCLUSION

Since the tragic occurrences of September 11, 2001, national security has become a significant concern for the nation. But because we live in fear of another terrorist attack, national security is now an overriding concern that interferes with the rights of immigrants.<sup>251</sup> Immigrants will feel the harshest backlash of legislation aimed at preventing another terrorist attack.<sup>252</sup> This backlash is evident in the anti-immigrant provisions of the Real ID Act. First, it will now be more difficult for immigrants to obtain asylum in the United States. Next, immigrants, legal and illegal, will have difficulty obtaining an acceptable driver's license or identification card which are necessary to living and conducting everyday transactions in the United States. Lastly, immigrant lives will be put at risk with the construction of physical barriers along the United States borders.

Statistics show that the Latino immigrant community will be the most adversely effected by the Real ID Act's provisions.<sup>253</sup> The number of Latino immigrants in the United States continues to grow as countries such as Mexico, El Salvador, and Guatemala account for high numbers of unauthorized immigrant population.<sup>254</sup> Access to driver's licenses and proper identity documents is a vital concern for the Latino community.<sup>255</sup> Asylum will be next to impossible for any refugee attempting to find safety, with the majority of refugees in the United States coming from

251. Raquel Aldana & Sylvia Lazos Vargas, "Aliens" in *Our Midst Post-9/11: Legislating Outsiderness Within the Borders*, 38 U.C. DAVIS L. REV. 1683, 1718 (2005) (reviewing BILL ONG HING, *DEFINING AMERICA THROUGH IMMIGRATION POLICY (MAPPING RACISMS SERIES)* (2003); KEVIN R. JOHNSON, *THE "HUDDLED MASSES" MYTH: IMMIGRATION AND CIVIL RIGHTS* (2003); and VICTOR C. ROMERO, *ALIENATED: IMMIGRATION RIGHTS, THE CONSTITUTION, AND EQUALITY IN AMERICA* (2004)).

252. See Katherine Culliton, *In the Aftermath of September 11: Defending Civil Liberties in the Nation's Capital: The Treatment of Immigrants*, 8 UDC/DCSL. L. REV. 141, 142 (2004) (discussing several legislation measures that have passed since Sept. 11, 2001 directly aimed at immigrants).

253. See Robert Suro & Jeffery S. Passel, *The Rise of the Second Generation: Changing Patterns in Hispanic Population Growth*, PEW HISPANIC CENTER, Oct. 2003, available at [http://www.pewtrusts.com/pdf/pew\\_hispanic\\_2nd\\_generation\\_101403.pdf#search='growth%20rate%20of%20hispanic%20immigrants%20in%20the%20U.S.'](http://www.pewtrusts.com/pdf/pew_hispanic_2nd_generation_101403.pdf#search='growth%20rate%20of%20hispanic%20immigrants%20in%20the%20U.S.') (noting that since the 1970s, immigration is the fastest and largest source of Hispanic population growth).

254. See U.S. CITIZEN AND IMMIGRATION SERVICE, *ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES 1990-2000* (2003) (on file with author).

255. Letter from the Cuban American National Foundation (CANF) *et al.* to the U.S. Senate, Mar.18 2005, available at [http://www.maldef.org/pdf/Senate\\_Latino\\_groups\\_letter.pdf#search='Real%20id%20act%20and%20latino%20immigrants'](http://www.maldef.org/pdf/Senate_Latino_groups_letter.pdf#search='Real%20id%20act%20and%20latino%20immigrants') ("Access to driver's licenses and other state identification documents is a priority issue for the Latino community, and the ability to prove one's identity and lawfully operate a motor vehicle is crucial for all Americans.").

Cuba, Haiti, Nicaragua, and El Salvador.<sup>256</sup> The border fence in place in San Diego did not reduce the number of immigrants but simply shifted the migrants into more dangerous and remote areas.<sup>257</sup> Immigrants instead turned to human smugglers which led to an increase in border deaths, criminal activity, and violence.<sup>258</sup>

The Real ID Act's provisions will implement large-scale changes to immigration laws in exchange for national security.<sup>259</sup> Meanwhile, opponents have criticized that the legislation does nothing to secure the nation's borders.<sup>260</sup> Although secure borders are crucial in protecting against another terrorist attack, opponents argue that the United States–Mexico border “poses little threat in terms of terrorism.”<sup>261</sup> The Real ID Act actually repeals safeguards against terrorism that were integrated in the Intelligence Reform and Terrorism Prevention Act of 2004.<sup>262</sup> The United States Senate Committee on Homeland Security and Governmental Affairs stated itself that the Real ID Act, “includes anti-immigration and anti-asylum provisions which the 9/11 Commission has said are unrelated to the war on terrorism.”<sup>263</sup> Ranking member of the committee, Senator Joe Lieberman, stated that the nation would be safer by simply implementing the protections under the IRTP Act of 2004.<sup>264</sup> According to Senator Lieberman, “[w]e must not allow an ideological de-

256. See U.S. Dep't of State, *Refugee Admissions Program for Latin America and the Caribbean*, <http://www.state.gov/g/prm/rls/fs/2004/28211.htm> (last visited Dec. 15, 2006) (stating that since 1975 of the 79,000 refugees from the area accepted into the U.S., 50,000 have been Cuban, with “other significant representation from Haiti, Nicaragua, and El Salvador”).

257. MEXICAN AMERICAN LEGAL DEFENSE EDUCATIONAL FUND, LETTER TO THE SENATE (2005), available at [http://www.maldef.org/pdf/Senate\\_Latino\\_groups\\_letter.pdf#search=real%20id%20act%20and%20latino%20immigrants'](http://www.maldef.org/pdf/Senate_Latino_groups_letter.pdf#search=real%20id%20act%20and%20latino%20immigrants).

258. *Id.*

259. See Daniela Gerson, *Immigration Bill Opponents Claim It Derails Bush Plan*, N.Y. SUN, Feb. 2, 2005, at 6 (quoting Mathew Dunn, New York chapter chairman of the American Immigration Lawyers Association, as saying “[t]he provisions seek large-scale changes to laws in the name of national security, however, none of its provisions do anything [to] even remotely . . . to secure our borders”).

260. Daniela Gerson, *Immigration Bill Opponents Claim It Derails Bush Plan*, N.Y. SUN, Feb. 2, 2005, at 6.

261. Ryan D. Frei, Comment, *Reforming U.S. Immigration Policy in an Era of Latin American Immigration: The Logic Inherent in Accommodating the Inevitable*, 39 U. RICH. L. REV. 1355, 1396 (2005).

262. See *Leiberman Says Real ID Act Would Make Nation Less Safe by Repealing Terrorist Safeguards Enacted Upon Recommendation of 9/11 Commission*, STATES NEWS SERV., Apr. 14, 2005 (on file with author) (summarizing Lieberman's disparaging remarks about the Real ID Act and explaining how the Real ID Act disguises immigration reform as necessary for national security).

263. *Id.*

264. *Id.*

bate over immigration policy to derail initiatives vital to the war against terrorism.”<sup>265</sup> Furthermore, 9/11 Commissioners stated that the provisions of the Real ID Act have more to do with immigration than with national security.<sup>266</sup> “Homeland security is about taking useful steps to prevent another attack. It’s not about keeping gainfully employed Mexican illegals from driving to work, or cracking down on the imagined hordes gaming our asylum system.”<sup>267</sup> “The Real ID Act contradicts our historic identity as a nation that provides a haven for the oppressed.”<sup>268</sup>

In order to uphold the United States “historic identity,”<sup>269</sup> it is necessary for the government to continue to balance the rights of the individual against the need for such stringent legislation for the purpose of national security. The nation’s leaders should keep in mind that fear is not what this country was founded upon.<sup>270</sup> “Immigrants founded the United States; they were vital contributors to the industrial and manufacturing bases upon which this country rose to international economic dominance; they have helped to mold the uniquely diverse ‘American’ identity.”<sup>271</sup>

Furthermore, it must be recognized that national security is not just an immigration concern.<sup>272</sup>

The necessary pursuit of national security should not have been used by the new majority in power to enact unrelated and radical changes

265. *Id.*

266. *Id.*

267. National Immigration Forum, *Facts on Immigration: A Real Disaster*, <http://www.immigrationforum.org/PrintFriendly.aspx?tabid=714> (last visited Dec. 21, 2006) (commenting on the Feb. 17, 2005 Wall Street Journal Editorial, National ID Party).

268. See *Leiberman Says Real ID Act Would Make Nation Less Safe by Repealing Terrorist Safeguards Enacted Upon Recommendation of 9/11 Commission*, STATES NEWS SERV., Apr. 14, 2005 (on file with author) (urging the Senate to oppose the Real ID Act).

269. *Id.*

270. See Robert M. Chesney, *Civil Liberties and the Terrorism Prevention Paradigm: The Guilt by Association Critique, Terrorism and the Constitution: Sacrificing Civil Liberties in the Name of National Security*, 101 MICH. L. REV. 1408, 1414 (2003) (noting that some scholars have commented that fear of another terrorist attack is what causes decisions makers to “underestimate the value of the civil liberties at stake”).

271. See Ryan D. Frei, Comment, *Reforming U.S. Immigration Policy in an Era of Latin American Immigration: The Logic Inherent in Accommodating the Inevitable*, 39 U. RICH. L. REV. 1355, 1400 (2005) (arguing that the U.S. should welcome motivated immigrants so that the U.S. can benefit from their labor).

272. See Raquel Aldana & Sylvia Lazos Vargas, “Aliens” in Our Midst Post-9/11: *Legislating Outsiderhood Within the Borders*, 38 U.C. DAVIS L. REV. 1683, 1685 (2005) (reviewing BILL ONG HING, *DEFINING AMERICA THROUGH IMMIGRATION POLICY* (MAPPING RACISMS SERIES) (2003); KEVIN R. JOHNSON, *THE “HUDDLED MASSES” MYTH: IMMIGRATION AND CIVIL RIGHTS* (2003); and VICTOR C. ROMERO, *ALIENATED: IMMIGRATION RIGHTS, THE CONSTITUTION, AND EQUALITY IN AMERICA* (2004)).

in immigration laws under the guise of preventing terrorism. Unfortunately, members of Congress have abused arguments for national security to enact hundreds of radical changes in immigration laws.<sup>273</sup>

The strongest supporter of the Real ID Act, Representative Sensenbrenner, commented on the act's provisions and their exclusion from the IRTP Act of 2004 by stating, "[a]lthough the intelligence bill did not include the immigration and homeland-security provisions I sought, it did help me bring the issue of illegal immigrants to the forefront of the national debate."<sup>274</sup> This statement came from the same person who claims that "[t]he Real ID Act will make America a safer place."<sup>275</sup> The nation's leaders must keep in mind that the goals of promoting rational immigration policies and protecting the United States from another terrorist attack do not have to be mutually exclusive.<sup>276</sup>

It is imperative that Congress allow for changes implemented by the Intelligence Reform and Terrorism Prevention Act of 2004 to take its course before repealing its crucial pieces. The IRTP Act includes many provisions that this country's political representatives viewed as necessary to safeguard against terrorist attacks.<sup>277</sup> Furthermore, states should have an input on securing their identification card and driver's license standards. Most states favored the approach taken by the IRTP Act.<sup>278</sup> Addressing these issues at a local level is important because the number of immigrants in each state varies tremendously. The broad provisions of the Real ID Act will have varying effects that will disproportionately burden each state. The nation's leaders must balance the need for national security with rights of individuals. Only then can the United States continue to live up to their historic identity as a safe haven for the oppressed.

273. Zoe Lofgren, Symposium: Globalization, Security & Human Rights: Immigration in the Twenty-First Century, *A Decade of Radical Change in Immigration Law: An Inside Perspective*, 16 STAN. L. & POL'Y REV. 349, 377 (2005).

274. See Daniela Gerson, *Immigration Bill Opponents Claim It Derails Bush Plan*, N.Y. SUN, Feb. 2, 2005, at 6 (quoting U.S. House Judiciary Committee Chairman James Sensenbrenner).

275. See *Sensenbrenner House Floor Statement on the Real ID Legislation*, U.S. NEWSWIRE, Feb. 9, 2005 (urging Congress to support the Real ID Act).

276. See Ryan D. Frei, Comment, *Reforming U.S. Immigration Policy in an Era of Latin American Immigration: The Logic Inherent in Accommodating the Inevitable*, 39 U. RICH. L. REV. 1355, 1396 (2005) (arguing that the United States-Mexico border does not pose a great terrorist threat and therefore increased funding to secure the border is misguided).

277. *Leiberman Says Real ID Act Would Make Nation Less Safe by Repealing Terrorist Safeguards Enacted Upon Recommendation of 9/11 Commission*, STATES NEWS SERV., Apr. 14, 2005 (on file with author).

278. Phil Magers, *Analysis: States Might Challenge Real ID Act*, UNITED PRESS INT'L, May 12, 2005, <http://washingtontimes.com/upi-breaking/20050511-051519-7157r.htm>.

Only then can the United States prominently display Emma Lazarus' words:

“Give me your tired, your poor,  
Your huddled masses yearning to breathe free,  
The wretched refuse of your teeming shore.  
Send these, the homeless, tempest-tost to me,  
I lift my lamp beside the golden door!”<sup>279</sup>

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279. Emma Lazarus, *The New Colossus*, [http://www.brainyencyclopedia.com/encyclopedia/t/th/the\\_new\\_colossus.html](http://www.brainyencyclopedia.com/encyclopedia/t/th/the_new_colossus.html) (last visited Dec. 20, 2006).